Supreme Court, U.S.
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In The
Supreme Court of the United States

FIDELITY EXPLORATION & PRODUCTION COMPANY,

Petitioner,

v.

NORTHERN PLAINS RESOURCE COUNCIL INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Water Act requires a National Pollutant Discharge Elimination System permit only for a discharge – i.e., for an "addition" – of a "pollutant" from a point source to waters of the United States. The question presented in this case is whether the pumping and release of natural, unaltered groundwater into a river is an "addition" of a "pollutant" requiring an NPDES permit under the Clean Water Act.

This issue is of great national importance. The Supreme Court recently granted certiorari to review the Eleventh Circuit's decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002). The question presented in that case is whether the pumping and release of natural, unaltered surface water into navigable waters is an addition of a pollutant requiring an NPDES permit under the Act. Thus, the question presented here is, as the Ninth Circuit put it, "practically indistinguishable" from the issue in *Miccosukee*.

RULES 29.6 AND 14.1 STATEMENT

WBI Holdings, Inc. owns 100 percent of the issued and outstanding common stock of Petitioner Fidelity Exploration & Production Company. Centennial Energy Holdings, Inc. owns 100 percent of the issued and outstanding common stock of WBI Holdings. MDU Resources Group, Inc. owns 100 percent of the issued and outstanding common stock of Centennial. No publicly-held company owns 10 percent or more of Fidelity stock.

Respondent in this case is Northern Plains Resource Council Inc., plaintiff and appellant below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Fidelity Exploration & Production Company ("Fidelity") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported as *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155 (9th Cir. 2003).[1] App., *infra*, 1a-18a. The district court's judgment and order are unreported. App. 19a-22a. The district court issued an oral ruling. App. 23a-33a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals entered judgment on April 10, 2003. On June 20, 2003, Justice O'Connor extended the time for filing a petition for certiorari to and including August 8, 2003. App. 34a.

[1] The Ninth Circuit's decision incorrectly referred to Fidelity as Fidelity Exploration & Development Company.

STATUTORY PROVISIONS INVOLVED

Under Sections 301(a) and 402(a) of the federal Clean Water Act, 33 U.S.C. §§ 1311(a) & 1342(a), a National Pollutant Discharge Elimination System permit is required for "the discharge of any pollutant by any person." Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source. . . . " Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines "pollutant": "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

STATEMENT OF THE CASE

A. Fidelity's Operations

Fidelity extracts natural gas from underground coal seams in the Powder River Basin in northeastern Wyoming and southeastern Montana. Natural gas from coal seams is sometimes referred to as coal bed methane or coal bed natural gas. It is indistinguishable from what is commonly referred to as "natural gas" and is used to heat homes and businesses, to generate electricity, and for manufacturing uses. It is one of the cleanest burning fossil fuels. To extract coal bed natural gas, a well is drilled into the coal seam and some of the groundwater trapped within the seam is pumped to the surface. This relieves the water pressure within the seam, releasing the natural gas, which is then separately piped to the surface.

Throughout this process, no substance or chemical is added to the groundwater. When the unaltered groundwater reaches the surface, Fidelity manages the disposition of the water through various means, including releasing the water into the Tongue River, holding ponds, and livestock watering ponds. Local farmers, ranchers, and landowners throughout the Powder River Basin similarly pump water from coal seams for domestic and stock watering purposes and for use by wildlife.

B. Montana's Regulation Of Releases Of Groundwater

Under the federal Clean Water Act, a National Pollutant Discharge Elimination System permit is required for the discharge of pollutants from a point source into navigable waters. The Act authorizes each state to establish "its own permit program for discharges into navigable waters within its jurisdiction." 33 U.S.C. § 1342(b). The United States Environmental Protection Agency has approved Montana's permit program. The Montana Department of Environmental Quality administers the program and issues permits for the discharges of pollutants to navigable waters within the State.

The Clean Water Act also requires each state to establish water quality standards for navigable waters within its jurisdiction. 33 U.S.C. § 1313(c)-(d). These standards define the beneficial uses for each water body (*e.g.*, recreation, propagation of fish and wildlife, public water supplies, etc.) and the specific limits for the water body that need to be maintained to support those uses.

The Clean Water Act therefore embodies a cooperative partnership between the states and the federal government to protect and enhance the quality of navigable waters, and relies heavily on the states to implement the Act. The Act is designed to protect water quality while at the same time limiting federal intrusion into state water management and regulation. Section 101(b) of the Act states: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA]. . . . " 33 U.S.C. § 1251(b). These policies are implemented through the state's setting of water quality standards for navigable waters within the state, through the NPDES permitting program through which the states enforce those water quality standards, and through non-NPDES state water quality programs. *See* 33 U.S.C. §§ 1288, 1313(e) & 1329 (state water quality programs).

The Montana Department of Environmental Quality, in implementing the Clean Water Act, regulates releases of unaltered groundwater to ensure the preservation and protection of water quality in navigable waters. As a component of its water quality program, Montana has enacted a statute providing that a permit is not required to discharge unaltered groundwater to surface water if standards protecting the quality of the receiving waters are met. In particular, Section 75-5-401(1)(b) of the Montana Code provides:

> Discharge to surface water of ground water that is not altered from its ambient quality does not

> constitute a discharge requiring a permit under this part if:
>
> > (i) the discharge does not contain industrial waste, sewage, or other wastes; (ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and (iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters.

With respect to Fidelity's releases of groundwater, the Montana Department of Environmental Quality reviewed the water quality data and determined that a permit was not required for releases into the Tongue River because the groundwater was not a waste and because the releases satisfied the water quality standards for the River, and so met the conditions specified in the Montana Code.[2]

Fidelity nevertheless elected to apply to the Montana Department of Environmental Quality for a discharge permit.[3] Currently, Fidelity's releases of unaltered

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[2] The Department also determined that the statutory permitting exemption did not apply to Fidelity's releases of groundwater into Squirrel Creek, a tributary of the Tongue River. Consequently, Fidelity does not release any groundwater into Squirrel Creek.

[3] In December 1998, EPA expressed concerns about Montana's permitting exemption. In January 1999, the Montana Department of Environmental Quality vigorously defended the statutory exemption, explaining to EPA that natural, unaltered groundwater is not a "pollutant" under the Clean Water Act because it does not contain any industrial waste, sewage or other wastes. In February 2001, well after the commencement of this lawsuit, EPA responded, suggesting that Montana amend the statute to clarify the meaning of the exemption.

groundwater to the Tongue River are authorized by a Montana discharge permit, even though the Department concluded that the statutory exemption applies to those releases. This dispute remains very real, however.[4]

C. The Decisions Below

Northern Plains brought this suit to challenge Fidelity's releases of groundwater without an NPDES permit. Northern Plains argued before the district court that Fidelity's release of natural, unaltered groundwater was a discharge of pollutants requiring a permit under the Clean Water Act. The district court rejected this claim, finding that no permit was required because natural, unaltered water is not a "pollutant" under the Act's plain words. The district court ruled that unaltered groundwater does not fit within any of the categories listed in Section 502(6) of the Act, 33 U.S.C. § 1362(6), which defines the term "pollutant." App. 28a.

The Ninth Circuit, however, concluded that the water Fidelity releases into the Tongue River is a pollutant under the Act. In coming to this conclusion, the court relied on the Eleventh Circuit's decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002). Citing *Miccosukee*, the Ninth Circuit ruled that the Act's requirement that pollution be "man-induced" refers to the effect on the receiving water, and applies even though the water being released is natural and unaltered by man. App. 12a. The

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[4] The case is not moot, as Northern Plains is suing for penalties for Fidelity's previous groundwater releases without a permit.

Ninth Circuit also relied on *Miccosukee* in concluding that "transporting water from one water body to another can violate the CWA." App. 14a.

The Ninth Circuit determined that the issues presented in this case are "practically indistinguishable" from the issues raised in *Miccosukee*. App. 14a-15a. On June 27, 2003, this Court granted certiorari in *Miccosukee* on the following question: "Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act."

REASONS FOR GRANTING THE PETITION

1. **The Act's plain words.** The Clean Water Act states that "pollutant" "means" specific items listed in the Act. Water in its natural state is not on the list, and so is not a "pollutant" under the Act's plain words. The Ninth Circuit's ruling that natural, unaltered groundwater is a "pollutant" therefore does violence to the Act's plain words.

The Ninth Circuit nevertheless posits that natural water metamorphoses into a pollutant when, unaltered, it is released from one body of natural water into another. But there is no metamorphosis: Natural water not a pollutant before release is not transformed into a pollutant after release, because it is the same natural water before and after.

These violations of the statute's plain words and common sense offend the Act's purpose and upend the

balance and intrude upon the state-federal boundaries the Act sets. The Act leaves to the States regulation of water pollution that does not involve the discharge of pollutants from a point source. But the Ninth Circuit's ruling regulates releases of natural water that do not involve the discharge of pollutants, and runs over Montana's regulation of those releases, notwithstanding the Act leaves regulation of them to it.

The upshot is that the Ninth Circuit's ruling would federalize water management activities left to the States – including the transport and release of water for flood control, municipal water supply, environmental enhancement, and, as here, the release of natural groundwater. It would require an NPDES permit for virtually every release of natural water to another body of water, greatly expanding the NPDES program's reach. Western Senators, writing in support of granting certiorari in *Miccosukee*, warned about those dangerous excesses. The same dangers and excesses exist here, for this case remains, as the Ninth Circuit made clear, "practically indistinguishable" from *Miccosukee*.

The Court should grant certiorari to mandate that the Act be interpreted and administered in accordance with its plain words, and to keep the federal permitting scheme within the federalist boundaries Congress set for it.

2. **The Circuit Court conflict.** The Fourth, Sixth and District of Columbia Circuits hold that a Clean Water Act permit is not required for releases of water unless pollutants from the "outside world" are added to the water by the point source which releases it, and necessarily so: The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point

source." Thus, the point source must be the origin of the pollutants it releases.

The First, Second and Eleventh Circuits (*Miccosukee*), followed by the Ninth Circuit here, hold that the release of natural water from one body of water to another requires a permit even though the point source releasing the water adds no pollutants from the "outside world," or anywhere else, to it. Notwithstanding what the Act says, those circuits rule that the point source need not be the origin of the pollutants it releases.

This Court should grant certiorari to resolve that sharp circuit conflict, and so to eliminate the same dangers and excesses that the Ninth Circuit's misreading of "pollutant" creates.

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER RELEASE OF UNALTERED GROUNDWATER INTO A RIVER IS THE "ADDITION" OF A "POLLUTANT" FROM A POINT SOURCE UNDER THE CLEAN WATER ACT

A. Water Is Not A Pollutant

The Act defines "pollutant" as follows: "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The district court recognized that "pollutant" is a defined term under the Act and that groundwater does not fall within the Act's definition. The Ninth Circuit, however, concluded

that natural, unaltered water is a "pollutant" under the Act when it is transported from one water body and released into another, at least where the transported water's constituents are different from the receiving water's. App. 4a (stating that the groundwater Fidelity releases is "distinctly different" from the water in the Tongue River); and 14a (stating that "transporting water from one water body to another can violate the CWA").

If the Ninth Circuit's ruling is allowed to stand, any natural water transported from one water body and released into another would be a "pollutant" under the Act. As different waters inevitably contain different constituents, the Ninth Circuit's decision would effectively require an NPDES permit for virtually any release of water into any navigable water. That would greatly expand the reach of the Clean Water Act and impose enormous burdens on states such as Montana charged with implementing the federal NPDES permit program. If "transporting water from one water body to another can violate the CWA" because natural water is a "pollutant" under the Act, as the Ninth Circuit concludes (App. 14a), then it is difficult to imagine what is *not* covered by the Act's definition of "pollutant."

The Ninth Circuit recognized that the issue of whether water is a "pollutant" is "practically indistinguishable" from the issue presented by the Eleventh Circuit's decision in *Miccosukee*: i.e., whether the release of water into a navigable waterway constitutes the addition of a pollutant under the Act. App. 14a-15a. In *Miccosukee*, a bipartisan group of prominent United States Senators warned of the perils of requiring an NPDES permit for "any transfer of water containing a measurable quantity of constituents . . . even though the transfer of

water is in its natural condition, and the entity moving the water adds no pollutants." *See South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (Supreme Court No. 02-626), Petitioner's Supplemental Brief, App. 11a. Such an expansive rule would constrain the states' ability to manage water and interfere with land use planning decisions. *Id.*, App. 11a-12a. The Governor of Idaho similarly warned of the potential far reaching impacts and dangerous precedents that would result from both the Eleventh Circuit's decision in *Miccosukee* and the Ninth Circuit's decision in this case. *Id.*, App. 5a-10a. These decisions would affect water planning decisions throughout the West and place "state-delegated CWA programs on a slippery slope favoring the top-down regulatory decision making that 'cooperative federalism' models were designed to avoid." *Id.*, App. 8a-9a.

The implications of the Ninth Circuit's ruling extend far beyond this case. The ruling conflicts with the Clean Water Act's definition of "pollutant," enlarges the scope of the NPDES permit program, and threatens to upset the balance struck by the Act between state and federal interests.

1. The Clean Water Act's Definition Of "Pollutant" Does Not Include Releases Of Water

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), carefully interpreted the Act's definition of "pollutant." The court warned that the Act's "restrictive phrasing" of this term "makes us cautious in adding new terms to the definition." *Id.* at 171-72. The court observed that the definition of "pollutant" uses the precise term "means" rather than the looser phrase "includes" used

elsewhere in the Act. *Id.* at 171-72 & n.49.[5] This makes clear Congress intended the definition to mean exactly what it says it means. *Id.* at 172 ("[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated") (citations and internal quotation marks omitted).

Gorsuch also emphasized that both the Senate and the House had initially used unlimited phrasing to define "pollutant" – "'the term 'pollutant' means, *but is not limited to* . . . industrial, municipal, agricultural, and *other waste* discharged into water.'" *Id.* at 173 (quoting H.R. 11896, 92nd Cong., 2d Sess. § 502(6) (1972), *reprinted in* 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 893, 1068 (Comm. Print 1973) ("1972 Leg. Hist."); and S. 2770, 92nd Cong., 1st Sess. § 502(f) (1971), *reprinted in* 2 1972 Leg. Hist. at 1534, 1697 (emphasis added)). But the conference committee deleted "but is not limited to" and "other waste" and instead set forth a specifically limited definition: "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." *See Gorsuch*, 693 F.2d at 173; S. Rep. No. 1236 (Conf. Rep.), 92nd Cong., 2d Sess. 143-44 (1972), *reprinted in* 1

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[5] For example, the Act defines "point source" broadly as "any discernible, confined and discrete conveyance, *including but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added).

1972 Leg. Hist. at 281, 326-27. *Gorsuch* therefore endorsed EPA's view that "Congress purposely limited the federal NPDES permit program to certain well-recognized pollutants and *left control of other water-altering substances or conditions to the states. . . .* " *Gorsuch*, 693 F.2d at 172 (emphasis added).

Gorsuch further emphasized the difference between the Act's limited definition of "pollutant" and the unlimited definition of "refuse" used in the Refuse Act of 1899. *Id.* at 172-73. The Refuse Act prohibited the discharge of "any refuse matter of any kind or description whatever . . . into any navigable water of the United States. . . . " 33 U.S.C. § 407.

The court similarly highlighted the distinctions between the Act's narrowly limited definition of "pollutant" and its broad definition of "pollution" in Section 502(19): "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). The court explained:

> [T]he broad term "refuse" was replaced with a list of specific items "so that litigable issues are avoided over the question of whether the addition of a particular material is subject to control requirements." Needless to say, if "pollutant" was intended to be as all-encompassing as "pollution," there would have been no need to fear litigation over what is included, and hence no need for such a definitional list.

Gorsuch, 693 F.2d at 173 (quoting S. Rep. No. 414, 92nd Cong., 1st Sess. 76 (1971), *reprinted in* 2 1972 Leg. Hist. at 1415, 1494).

Gorsuch's reasoned analysis and its careful attention to the Act's words and legislative history demonstrate that Congress intended "pollutant" to mean what the Act says it means: the pollutants the Act lists and nothing more. Under any reasonable construction, natural, unaltered groundwater is not one of the "well-recognized pollutants" listed in 33 U.S.C. § 1362(6). *See Gorsuch*, 693 F.2d at 172.

Therefore, the Ninth Circuit's ruling that unaltered groundwater is a pollutant flatly conflicts with *Gorsuch* and does violence to the Act's plain words: Statutes must be read to mean what they plainly say, especially where they specifically provide they mean what they say. *See Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.") (citing *Colautti v. Franklin*, 439 U.S. 379, 392 & n.10 (1979)).

The Ninth Circuit's ruling does violence to the Act's spirit as well as its letter. The management of water is a local issue. *See* 33 U.S.C. § 1251(b), (g). As explained in the Western Senators' letter in support of the petition in *Miccosukee*, a rule requiring a permit for the simple transfer of natural water from one body to another would conflict with the well-established balance under the Clean Water Act between state and federal interests and threaten the states' ability to manage water resources. *See South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (Supreme Court No. 02-626), Petitioner's Supplemental Brief, App. 12a.

Natural groundwater is not a pollutant, and Fidelity's releases of this unaltered water are not an "addition" subject to regulation under the Clean Water Act in any

event.[6] The regulation of those releases should have been left to the State of Montana.

Montana has a regulatory system in place to ensure that releases of unaltered groundwater will not go unchecked. This system requires a permit for the release of groundwater in its ambient state unless the release meets all three of the following conditions: (a) it does not contain industrial waste, sewage or other wastes; (b) it does not cause the receiving water to exceed water quality standards for any parameters; and (c) it does not increase the concentration of those parameters for which the receiving waters already exceed such standards. *See* Montana Code § 75-5-401(1)(b). Fidelity's release of groundwater into the Tongue River met all of these conditions. The Ninth Circuit erred in misreading the Act's plain words, and it erred in overturning Montana's regulatory system for addressing water quality issues respecting releases of unaltered groundwater within the State.

2. The Ninth Circuit's Decision Ignores The Act's Distinction Between "Pollutants" And "Pollution"

The Ninth Circuit found that its conclusion that groundwater is a pollutant "is consistent with the CWA's definition of 'pollution.'" App. 11a. But this finding ignores the Act's definition of "pollutant" and blurs the critical distinctions between "pollutant" and "pollution." The NPDES permit program covers only the discharge of

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[6] *See* Part B, *infra*; *Gorsuch*, *supra*; *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

"pollutants." It does not extend to every release into navigable waters that might result in "pollution."

The Act defines "pollution" as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). The Ninth Circuit held that Fidelity's releases of water into the Tongue River cause "pollution" because the released water affected the quality of the river water (App. 12a), even though the river continued to meet Montana's water quality standards.

Again, however, *Gorsuch* explained the critical differences between the Act's specific, item-by-item definition of "pollutant" on the one hand, and its "all-encompassing" definition of "pollution" on the other. 693 F.2d at 173, 176. In so doing, *Gorsuch* explained the limits of the NPDES permit program, which regulates only the discharge of "pollutants," and does not reach all water "pollution." The court explained:

> [I]t does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, e.g., "all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to "addition" of "pollutants" "from" a point source.

Id. at 176. *See also National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988) (making the same distinction as *Gorsuch* between "pollutants" and "pollution"). *Gorsuch* therefore illustrates that releases to water that may involve "pollution" – but that do *not* constitute an addition of "pollutants" listed in the Act – are left to regulation by the states. *See, e.g.*, 33

U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate *pollution*. . . . ") (emphasis added).

The distinction between "pollutants" and "pollution" illustrates the cooperative federalism embodied in the Clean Water Act. The NPDES permitting scheme regulates the addition of specific "pollutants" from a point source to navigable waters, while non-NPDES state water quality programs supplement that scheme by regulating "pollution." The Ninth Circuit confused these two complimentary but distinct components of the Act, and it consequently erred in requiring an NPDES permit in this case.

In sum, the Ninth Circuit's reliance on the definition of "pollution" is misplaced and does not support the court's conclusion that natural water that isn't a pollutant by some alchemy becomes a "pollutant" when released into a navigable water.

3. The Water Fidelity Releases Into The Tongue River Is Not An "Industrial Waste" Or Other Pollutant Listed In The Act

The Ninth Circuit recognized that natural water is not listed as a pollutant in Section 502(6) of the Act, 33 U.S.C. § 1362(6). App. 9a. It ruled, however, that the water Fidelity releases into the Tongue River is a pollutant on the theory it is an "industrial waste." *Id.* This ruling conflicts with the Act's definition of "pollutant" and the meaning of "industrial waste."

The Ninth Circuit held that the natural groundwater Fidelity releases is an "industrial waste" under section 502(6) of the Act, 33 U.S.C. § 1362(6), because it is an "unwanted byproduct" of the methane extraction process. App. 10a.[7] Under the Ninth Circuit's logic, natural water that is not waste becomes "waste" when released to surface waters in connection with a commercial process, even though unchanged from its natural state. Therefore, any natural water used in connection with any commercial process metamorphoses into "industrial waste," although absolutely unaltered in any way by human activity. But there is no metamorphosis: Natural water that is not waste before used in some process and is not altered by the process is not waste after the process, because it is the same natural water before and after.

The Ninth Circuit rested its expansive reading of "industrial waste" on cases where chemicals were *added* to the water. Thus, in *Sierra Club Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 550 (5th Cir. 1996), "chemicals used in the drilling process become mixed with the water." Not surprisingly, the court found that the discharged water containing those added chemicals, and also containing waste oil and grease from the oil and gas extraction process, constituted both a "chemical waste"

[7] Relying on a dictionary definition, the Ninth Circuit concluded that the groundwater Fidelity releases is an "industrial waste" because, in the court's view, it is a "useless or worthless byproduct" of Fidelity's operations. App. 10a (quoting American Heritage Dictionary 1447 (1979)). But there is nothing to suggest that this water is "useless" or "worthless." To the contrary, the record shows that the water can be and is used for domestic purposes such as drinking and bathing, for the watering of livestock, for recreational purposes, and for use by wildlife.

and an "industrial waste." *Id.* at 567-68. Here, in sharp contrast, nothing is added to the water before it is released into the Tongue River and, as the Montana Department of Environmental Quality recognized, this water does not contain any wastes.

Similarly, in *Hudson River Fisherman's Assn. v. City of New York*, 751 F. Supp. 1088, 1094, 1101-02 (S.D.N.Y. 1990), *aff'd without op.*, 940 F.2d 649 (2d Cir. 1991), the City added chlorine and aluminum sulfate to the water. The court held the resulting residues of those chemicals in the water were "pollutants," although the chemicals were initially added for the beneficial purpose of disinfecting the water, emphasizing they were added to the water with the intention of creating a physical and chemical reaction in it. Likewise, in *Umatilla Waterquality Protective Assn. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1313, 1315, 1322 (D. Or. 1997), where a vegetable processing facility used a brine pond as a wastewater treatment system, the court relied on the *Hudson River* case in finding that the residues from the pond were both "chemical wastes" and "industrial wastes."

In sum, case law does not support the Ninth Circuit's sweeping conclusion that natural water becomes an "industrial waste" when released in the same natural state into a navigable waterway from a commercial facility.[8]

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[8] The Ninth Circuit also pointed to Fidelity's permit application, which referred to the groundwater as "wastewater." App. 10a. But this is a far cry from saying that the water – which is unaltered from its natural state – is "chemical waste" or "industrial waste" and therefore a "pollutant" under the Clean Water Act's definition. Use of the term

(Continued on following page)

The Ninth Circuit also found that Fidelity's groundwater is "produced water" and is therefore necessarily a "pollutant" under the Act. App. 10a. But the Act does not list "produced water" as a "pollutant."[9] Nor does the *Cedar Point* case the Ninth Circuit relied on support the proposition that natural groundwater is a pollutant. In *Cedar Point*, the "produced water" from oil and gas extraction contained chemicals added during the drilling process, as well as waste oil and grease, so it fit the meaning of chemical and industrial waste. 73 F.3d at 550, 568.[10] Here,

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"wastewater" in Fidelity's permit application cannot change what the water is – natural, unaltered groundwater – or what the statute means.

[9] The regulatory definitions of "produced water" cited by the Ninth Circuit (App. 10a) do not even apply to Fidelity's operations. These regulations apply to offshore oil and gas operations (40 C.F.R. § 435.11(bb)) and coastal oil and gas operations (40 C.F.R. § 435.41(bb)). The regulations define "produced water" as "brine," reflecting the fact that this water originates from beneath the sea. And the specific standards in the regulations for "produced water" govern the amount of waste oil and grease (*see, e.g.*, 40 C.F.R. §§ 435.12, 435.13, 435.14, 435.15), which Fidelity's groundwater does not contain.

[10] *Cedar Point* emphasized that the "produced water" contained constituents listed as "pollutants" by EPA regulations. 73 F.3d at 568. But the fact that EPA has adopted standards for specific constituents under the NPDES program does not make all water containing a measurable quantity of any listed constituent a "pollutant" under the Act. If that were the case, the water in the Tongue River would itself be a "pollutant," since it contains constituents listed in the EPA regulations. The EPA standards relied on by *Cedar Point* do not expand the categories of "pollutants" beyond those defined in the Act. Rather, the standards are necessary as an administrative tool to establish effective effluent limitations in NPDES permits for specific constituents and to implement water quality standards, which define the limits for these constituents in the receiving water. The Montana Department of Environmental Quality has determined that Fidelity's releases of unaltered groundwater to the Tongue River meet the water quality standards for the River.

nothing is added to the water, so when released it is neither chemical nor industrial waste.

Finally, the Ninth Circuit pointed to 33 U.S.C. § 1362(6)(B). App. 11a. It provides that "pollutant" does *not* mean:

> water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

The court concluded that the water here must be "a pollutant within the plain meaning of the CWA and is subject to NPDES permitting requirements," because Fidelity does not re-inject the groundwater into a well. App. 11a. But this reasoning is backwards. The groundwater Fidelity releases does not fall within any of the specific categories in the Act's definition of pollutants and it is therefore not a "pollutant." An exemption from the statutory definition cannot be relied on to infer that the exclusive list of pollutants in the statute should be read to include a category not listed in it in the first place.

The Clean Water Act defines "pollutant." This definition does not include water in its natural state. This Court should grant certiorari to correct the Ninth Circuit's error in expanding the reach of the statute, a significant federal question, and to resolve the conflict between the Ninth Circuit and other circuit courts.

B. The Courts Of Appeal Are Sharply Divided Over Whether The Release Of Water Is An "Addition" Of Pollutants Under The Clean Water Act

This Court should grant review of the Ninth Circuit's decision because the federal courts of appeal are deeply divided over the NPDES permit program's scope. To support its expansive interpretation of the Act's permitting requirements to cover releases of natural water into a river, the Ninth Circuit relied on a line of cases culminating in *Miccosukee*, pointing out that the issue presented here is "practically indistinguishable from the issues considered by these cases." App. 14a-15a. The issue at the heart of those cases is whether the release of natural water from one water body into another constitutes the "addition" of a pollutant from a point source requiring an NPDES permit.[11]

The conflicting circuit court cases establish two very different tests for whether the release of water requires an NPDES permit. *Gorsuch* and *Consumers Power* hold that a permit is required only where a point source physically introduces pollutants to water from the "outside world," and releases the water with those pollutants added to it into receiving waters. *See Gorsuch*, 693 F.2d at 174-75;

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[11] The Ninth Circuit first noted that the only issue in this case was whether the water discharged by Fidelity into the Tongue River is a "pollutant" within the meaning of the Act. App. 7a, 8a. The Ninth Circuit therefore did not address head-on the issue of whether there was an "addition" of pollutants from a point source. The court ultimately concluded, however, that these two issues were essentially the same. The court therefore concluded that *Miccosukee* governed. App. 14a-15a.

Consumers Power, 862 F.2d at 584, 586. Therefore, an NPDES permit is not required where – as here – natural water from one water body is released into another body of water and nothing is added to the water that is released.

In sharp contrast, *Miccosukee* held that an NPDES permit is required whenever a point source releases water into the receiving water and the release may affect the quality of the receiving water – regardless of whether the point source itself added anything to the released water and so is the origin of the constituents in it. Thus, *Miccosukee* focused solely on the effect on the receiving water – a "pollution" question and therefore the wrong question – and treated as irrelevant the question of whether the point source adds, or does not add, pollutants to the water being released – a "pollutant" question and therefore the right question. 280 F.3d at 1368 & nn.5, 6. The Ninth Circuit agreed. App. 12a (quoting *Miccosukee*, 280 F.3d at 1368). The statute says otherwise. The Court should grant certiorari to resolve this split of authority.

1. The Traditional Rule That An "Addition" Of Pollutants Does Not Occur Unless The Point Source Physically Introduces Pollutants From The Outside World

The Clean Water Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). *Gorsuch* thus recognized that no permit is required under the Act unless "the point source itself physically introduces pollutants into water from the outside world." 693 F.2d at 174-75. The *Gorsuch* plaintiffs argued that the EPA was required to regulate dams under the NPDES permit program

because release of natural water from them causes pollution downstream. The court rejected this position. It held that a permit was not required where water is released by a point source from one body of water (the reservoir) into another (the river), where the point source adds nothing to the water. *Id.* Although the release of water from the reservoir into the river would cause "pollution" in the river, the court found there was no "addition" of a "pollutant" since nothing from the "outside world" was added to the water being released. *Id.* at 174-76.

Following *Gorsuch*, the Sixth Circuit in *Consumers Power* held that no permit was required where a hydroelectric facility pumped water out of Lake Michigan, significantly altered that water by killing a large number of fish and other aquatic organisms as the water passed through the facility's energy-generating turbines, and then released the water along with the dead fish and fish remains into the lake. The court held there was no "discharge" within the meaning of the Clean Water Act, since the facility did not "add" any pollutants into the lake: The facility did not create the fish killed by the turbines, for the fish were in the water from the beginning. *Consumers Power*, 862 F.2d at 584-86. Therefore, any water quality change in the lake resulting from the release of dead fish and fish remains into it was not "from the physical introduction of a pollutant from the outside world." *Id.* at 586.[12]

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[12] *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1975), also made clear that "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial dischargers, do not constitute an addition of pollutants by a plant through which they pass." 545 F.2d at 1377.

If no NPDES permit was required in *Consumers Power, a fortiori,* no permit is required here. As in *Consumers Power,* Fidelity does not create the constituents contained within the groundwater that it releases into the Tongue River, so Fidelity does not add anything to that water from the outside world. And, *unlike* the facility in *Consumers Powers* – which significantly altered the discharged water by destroying fish and other aquatic creatures in it – Fidelity does not alter the groundwater in any manner at all.

2. The Contrary Test Followed By The Ninth Circuit

The Ninth Circuit followed *Miccosukee* and the line of cases preceding it. They established a very different test from *Gorsuch.* Thus, *Dubois v. United States Dept. of Agriculture,* 102 F.3d 1273 (1st Cir. 1996), held that a permit was required for the release of water from a river into a pond, on the ground that this release would not have occurred naturally, so it was an "addition" to the receiving waters from a point source.[13] *Dubois* distinguished *Gorsuch* as involving "a dam that merely accumulates the same water," and not the transport of water from one water body to another. *Dubois,* 102 F.3d at 1299. But *Gorsuch* was not based on the fact that the reservoir and the receiving river were "the same water." To the contrary, *Gorsuch* made clear that the water does, in fact, pass

[13] In *Dubois,* a ski resort company took water from a river, pumped it through snowmaking equipment without adding anything to it, and then released it into a pond.

through a point source from one body of water (the reservoir) into another (the river). *Gorsuch*, 693 F.2d at 165, 175.[14] Furthermore, in *Gorsuch*, the release of water from the reservoir causing pollution in the river occurred only because the upstream river was dammed, and would not have occurred naturally.[15] *Dubois* ignored that fact, and the conflict between *Dubois* and *Gorsuch* remains unresolved.

The same is true for *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492-93 (2d Cir. 2001), which also erroneously distinguished *Gorsuch* "as involving movement of water within the same water body." *Catskill* held that a permit was required for the release of water from a reservoir into a creek.[16] Like the First Circuit in *Dubois*, the court emphasized that water from the reservoir would not reach the creek "[u]nder natural conditions," *id.* at 484, and held the transfer of water from one body of water to another constituted an "addition" of pollutants requiring a permit, even though the point source added nothing to the water it transferred. *Id.* at 493.

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[14] In holding that a permit was required, *Miccosukee* emphasized that while the water being discharged and the receiving water were formerly part of the same natural water body, they are now separate bodies of water because man separated them with levees, canals and impoundments. *Miccosukee*, 280 F.3d at 1369 n.8. Similarly, in *Gorsuch*, man made the reservoir and the downstream river separate bodies of water by constructing the dam.

[15] Similarly, in *Consumers Power*, the release of dead fish and fish remains into Lake Michigan occurred only because of the hydroelectric facility, and would not have occurred naturally.

[16] In *Catskill*, New York City transferred water from a reservoir, through a tunnel, and into a creek feeding another reservoir.

Miccosukee further illustrates the deep conflict between the circuits. Like *Dubois* and *Catskill*, *Miccosukee* held that a permit was required for the release of water from one water body into another. The court announced a "but for" test, concluding that "for an addition of pollutants to be from a point source, the relevant inquiry is whether – but for the point source – the pollutants would have been added to the receiving body of water," 280 F.3d at 1368, notwithstanding the point source added nothing to the water. The court dismissed the *Gorsuch* rule that the point source must be the source or origin of the pollutants. *Id.* at 1368 n.6.

This case intensifies the conflict among the circuit courts on this issue. The Ninth Circuit followed *Miccosukee*, *Catskill*, and *Dubois*, and concluded that those cases "apply insofar as they reject the argument that discharge of water cannot be a pollutant simply because the discharged water is unaltered and transported from one body of water to another." App. 14a-15a. Following the *Miccosukee* "but for" test, the Ninth Circuit relied on the fact that the released groundwater "would not flow into the Tongue River *but for* Fidelity's methane extraction process. . . . " App. 13a (emphasis added).

3. Review By This Court Is Needed To Resolve The Conflict

The conflict between the circuits is very clear and very real. Under *Gorsuch*, *Consumers Power* and *Appalachian*, a release of natural water from a point source does not trigger the need for an NPDES permit, unless the point source adds pollutants to the water being released. In other words, the point source must be the source or origin

of pollutants. Under the Ninth Circuit's decision in this case, *Catskill*, *Dubois* and *Miccosukee*, however, the point source need not be the origin of pollutants, or add anything at all to the natural water it releases. The only issue under these cases is whether the released water is different from the receiving waters and whether the release would occur but for the point source.

Supreme Court review is needed to resolve the sharp conflict between the circuits and to establish that the Clean Water Act means what it says. The Ninth Circuit's ruling that transporting unaltered, natural water from one water body to another violates the Clean Water Act extends the scope of the NPDES permitting program to include virtually all releases of natural water into navigable waters. The ruling threatens to federalize water management activities that have historically been left to the states – including the transport and release of water for flood control, municipal water supply, and environmental enhancement. *See, e.g., South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (Supreme Court No. 02-626), Petitioner's Supplemental Brief, App. 11a (Western Senators explaining that the transfer of water for a wide variety of state and local purposes is a routine practice managed by the states). For example, many communities in the West rely on conjunctive use programs involving the integrated management of ground and surface waters and the release of groundwater to surface waters when needed. Under the Ninth Circuit's logic, this critical aspect of water supply would be subject to NPDES permitting requirements. The Court should grant review to correct the Ninth Circuit's error on this important national issue.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT CERTIORARI PENDING THE COURT'S UPCOMING DECISION IN *MICCOSUKEE*

This Court recently granted certiorari to review the Eleventh Circuit's decision in *Miccosukee*. The question presented in *Miccosukee* is whether the pumping of water that adds nothing to the water being pumped constitutes the addition of a pollutant from a point source triggering the need for an NPDES permit. The Ninth Circuit expressly relied on *Miccosukee* and recognized that the issues presented in this case are "practically indistinguishable" from those presented in *Miccosukee* and its predecessors. App. 14a-15a.

This Court's decision in *Miccosukee* will likely resolve the issues presented in this case. Accordingly, at a minimum the Court should grant this petition for certiorari and hold this case pending the Court's decision in *Miccosukee*. In the event the Eleventh Circuit's decision in *Miccosukee* is reversed in whole or in part, the Ninth Circuit's decision should be vacated and the case either set for argument in this Court or remanded for rehearing in light of this Court's decision in *Miccosukee*.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, granted and the case held pending the Court's ruling in *Miccosukee*.

Respectfully submitted.

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325 F.3d 1155

NORTHERN PLAINS RESOURCE COUNCIL, Plaintiff-Appellant,

v.

FIDELITY EXPLORATION AND DEVELOPMENT COMPANY, Defendant-Appellee.

No. 02-35836.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 4, 2003.

Filed April 10, 2003.

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Appeal from the United States District Court for the District of Montana; Sam E. Haddon, District Judge, Presiding. D.C. No. CV-00-00105-SEH.

Before REINHARDT, W. FLETCHER, and GOULD, Circuit Judges.

OPINION

GOULD, Circuit Judge.

Defendant-Appellee Fidelity Exploration & Development Company ("Fidelity") extracts methane gas for commercial sale from coal seams located deep underground in the Powder River Basin, Montana. In the process of extracting coal bed methane (CBM), Fidelity pumps groundwater to the surface and discharges this water into the Tongue River. The water discharged is "salty," contains several chemical constituents identified as pollutants by Environmental Protection Agency (EPA) regulations, has characteristics that may degrade soil, and is unfit for irrigation. The Montana Department of Environmental Quality (MDEQ) advised Fidelity that no permit was required to discharge the coal bed methane groundwater because Montana state law exempts unaltered groundwater from state water quality requirements. Plaintiff-Appellant Northern Plains Resource Council (NPRC) filed a citizen suit under the federal Clean Water Act (CWA) in the District Court for the District of Montana, alleging that Fidelity unlawfully discharged pollutants into navigable waters of the United States. NPRC appeals the district court's grant of summary judgment to Fidelity.

On appeal, we decide (1) whether the CBM discharge water is a "pollutant" within the meaning of the CWA, and (2) whether Montana state law can exempt Fidelity from obtaining National Pollution Discharge Elimination System (NPDES) permits under the CWA. We hold that

the unaltered groundwater produced in association with methane gas extraction, and discharged into the river, is a pollutant within the meaning of the CWA. We also hold that states cannot create exemptions to the CWA, whether or not the EPA has delegated permitting authority to the state.

I

In 1997, Fidelity began exploring and developing natural gas from coal seams in the Powder River Basin, Montana. The coal reserves in Powder River Basin are several hundred feet below the ground and contain reservoirs of methane gas. The methane is trapped by groundwater that fills the interstitial areas of the coal reserves. To extract the methane, Fidelity drills a conventional well into the coal seam and pumps the trapped water to the surface to reduce water pressure. This pumping releases the trapped methane, which is captured at the surface and piped to market. Fidelity does not add chemicals to the pumped groundwater (CBM water). Fidelity discharges the unaltered CBM water into the Tongue River. Because CBM water comes from deep underground aquifers, it would not reach the Tongue River were it not for Fidelity's extraction process.

Though Fidelity does not add any chemicals to the CBM water before discharge, the water in its natural state contains suspended solids, calcium, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, and fluoride. The CBM water also contains measurable quantities of the following metals: aluminum, arsenic, barium, beryllium, boron, copper, lead, iron, manganese, strontium, and radium.

The CBM water is "salty," a characteristic measured by total dissolved solids or specific conductance. The mean total dissolved solids for the Tongue River is 475 mg/l as compared to 1,400 mg/l for the CBM water. Related to the "saltiness" of the CBM water is the water's high Sodium Absorption Ratio (SAR). SAR measures the ratio of sodium to calcium and magnesium in the water. The SAR of the CBM water discharged by Fidelity is on average 40 to 60 times greater than the background SAR of the Tongue River. For all these reasons, the CBM water is distinctly different from the Tongue River water to which it is added.

Farmers who use water from the Tongue River for irrigation are concerned with the "saltiness" and high SAR of CBM water because of the potential hazards these characteristics pose to soil structure. High SAR water, such as CBM water, causes soil particles to unbind and disperse, destroying soil structure and reducing or eliminating the ability of the soil to drain water. The Montana Department of Environmental Quality (MDEQ), in a Final Environmental Impact Statement analyzing coal bed methane extraction, warns that "clayey" soil, like that in the Tongue River Valley, is vulnerable to damage from high SAR water. Montana Statewide Final Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (hereinafter "Montana FEIS"), Soils Appendix SOI-1, *available at* www.deq.state.mt.us/CoalBedMethane/finaleis.asp. Fidelity's soil expert concluded that "the SAR of CBM water creates a permeability hazard and precludes its use for irrigation without mixing, treatment or addition of soil amendments." The MDEQ cautioned that unregulated discharge of CBM water would cause "[s]urface water quality in some watersheds [to] be slightly to severely

degraded, resulting in restricted downstream use of some waters." *Id.* 4-72. Some of the CBM water, however, is used by Fidelity's grazing lessee, CX Ranch, in livestock watering ponds and stock tanks.

In August 1998, Fidelity contacted the MDEQ about the possibility of discharging its CBM water into the Tongue River and Squirrel Creek. By letter, the MDEQ told Fidelity that it did not need a permit from the MDEQ to discharge into the Tongue River because the discharge was exempt under Montana Code section 75-5-401(1)(b), which provides:

> Discharge to surface water of groundwater that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part if:
>
> > (i) the discharge does not contain industrial waste, sewage, or other wastes; (ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and (iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters.

The MDEQ, however, warned Fidelity in the same letter that "the EPA, which provides state program oversight under the federal Clean Water Act, does not agree with the [Montana] Water Quality Act permit exclusion under 75-5-401(1)(b). Therefore, they may ask at some point that you obtain an [Montana Pollution Discharge

Elimination System (MPDES)] permit from us, or an NPDES permit from them."[1] The EPA told MDEQ that section 75-5-401(1)(b) of the Montana Code conflicts with the CWA because it exempts some discharges otherwise subject to the CWA from NPDES permitting requirements. The EPA stressed that "the fact that a discharge does not increase the concentration of a particular parameter does not exempt it from permitting requirements." The MDEQ responded, resisting revocation of the section 75-5-401(1)(b) exemption and arguing that "the exemption is consistent with federal requirements governing NPDES programs because discharges of unaltered, natural groundwater do not contain 'pollutants' as that term is defined under the Clean Water Act." In a final letter sent to the MDEQ by the EPA, the EPA reiterated its objection to section 75-5-401(1)(b) if applied to discharges that would otherwise require a permit under the CWA.

Even though MDEQ informed Fidelity in August 1998 that Montana state law exempted the discharge of unaltered groundwater, Fidelity filed MPDES permit applications in January 1999. At that time, Fidelity was discharging into both Squirrel Creek and the Tongue River without a permit.

NPRC sent a 60-day Notice of Intent to Sue letter to Fidelity, the MDEQ, and the EPA on April 18, 2000. NPRC alleged unpermitted discharges of pollutants into Squirrel Creek and the Tongue River. On June 23, 2000, NPRC

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[1] Congress has authorized both the EPA and states to implement CWA permit programs. *See* 33 U.S.C. § 1342(a)-(b). The EPA issues NPDES permits, whereas Montana issues MPDES permits.

filed a citizen suit under the CWA in federal district court alleging unpermitted discharges into Squirrel Creek. An amended complaint was filed on June 26, 2000, to add allegations of unlawful discharges into the Tongue River from outfalls not covered by an MPDES permit.[2]

The parties filed cross-motions for summary judgment in district court. The parties stipulated that of the five elements necessary to prove a violation of the CWA ((1) discharge, (2) pollutant, (3) from a point source, (4) to a navigable water, (5) without a permit), the only element at issue is whether the CBM water constitutes a pollutant; the other four elements are satisfied. The district court held that the CBM water was not a pollutant and granted summary judgment to Fidelity. NPRC appeals.[3]

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[2] On June 16, 2000, the MDEQ issued Fidelity an MPDES permit authorizing Fidelity to discharge into the Tongue from seven specified outfalls. The MDEQ did not issue a permit to discharge into Squirrel Creek. Even though the MPDES permit allowed discharge into the Tongue River from seven outfalls, Fidelity discharged from twelve outfalls and continued to do so until the MDEQ amended the permit on July 3, 2000, to allow discharge from ten outfalls. Fidelity did not receive an amended permit allowing discharge from ten outfalls until after the amended complaint was filed.

[3] Three amici briefs were filed in this case: (1) The Western Environmental Trade Association (WETA) filed a brief in support of Fidelity. WETA is an extraction industry advocacy group; (2) Tongue & Yellowstone Irrigation District and Tongue River Water Users' Association (T & Y) filed a brief in support of NPRC. T & Y is a group of ranchers and farmers who depend on the Tongue River for irrigation; and (3) Northern Cheyenne Tribe (Tribe). The Tongue River forms the eastern boundary of the Tribe's Reservation.

II

The CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. *See also Ass'n to Protect Hammersley, Eld, and Totten Inlets (APHETI) v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir.2002). Fidelity and NPRC agree that Fidelity discharged CBM water from a point source into navigable water without an NPDES permit. Given this agreement, we need only decide whether the groundwater derived from CBM extraction is a "pollutant" within the meaning of the CWA.

The district court granted summary judgment to Fidelity based on two conclusions: (1) CBM produced water is not a pollutant within the meaning of the CWA, and (2) Montana state law exempted Fidelity from CWA permitting requirements. We have jurisdiction, 33 U.S.C. § 1365(a); 28 U.S.C. § 1331, we review the district court's grant of summary judgment de novo, *see Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir.2002), and we reverse.

To determine whether CBM water is a "pollutant" regulated by the CWA, we begin with the plain language of the statute. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). The CWA defines "pollutant" broadly:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and *industrial,* municipal, and agricultural *waste* discharged into water. This term does not mean . . . water, gas, or other material which

> is injected into a well to facilitate production of oil and gas, *or water derived in association with oil or gas production and disposed of in a well,* if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(6) (emphasis added). Because this definition does not literally list "unaltered groundwater" as a pollutant, Fidelity argues, and the district court held, that CBM water is not a "pollutant." Fidelity's argument and the district court's holding are untenable. The plain language of the CWA requires the conclusion that CBM water is a pollutant subject to regulation under the CWA.

The reasons for our conclusion are apparent from the statute's terms. First, CBM water is a "pollutant" because it is "industrial waste." Contrary to Fidelity's suggestion that "industrial waste" refers to "sludge oozing from manufacturing or processing plants, barrels filled with toxic slime, and raw sewage floating in a river," industrial waste is not limited to only the most heinous and toxic forms of industrial byproducts. *See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.,* 73 F.3d 546, 568 (5th Cir.1996) (concluding "produced water" is encompassed in "industrial waste"); *see also Hudson River Fishermen's Ass'n v. City of New York,* 751 F.Supp. 1088, 1101 (S.D.N.Y.1990) (holding that chlorine residues are pollutants), *aff'd,* 940 F.2d 649 (2d Cir. 1991); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.,* 962 F.Supp. 1312, 1322 (D.Or.1997) (holding that brine residues are industrial waste and therefore pollutants). "Industrial" means "of, pertaining to, or derived from industry." American Heritage

Dictionary 672 (1979). "Industry," in turn, is defined as "the commercial production and sale of goods and services." *Id.* "Waste" is defined as "any useless or worthless byproduct of a process or the like; refuse or excess material." *Id.* at 1447. Combining these ordinary meanings, "industrial waste" is any useless byproduct derived from the commercial production and sale of goods and services. Because Fidelity is engaged in production of methane gas for commercial sale and because CBM water is an unwanted byproduct of the extraction process, CBM water falls squarely within the ordinary meaning of "industrial waste." Even Fidelity referred to CBM water as "wastewater" in its application to the EPA for an NPDES permit.

Second, CBM water is also a "pollutant" by virtue of being "produced water" derived from gas extraction. *See Cedar Point Oil Co.*, 73 F.3d at 568 (addressing whether discharge of water "produced" during the extraction of oil and gas without an NPDES permit violated the CWA and concluding that produced water is an "industrial waste" regulated by the CWA). The EPA defines "produced water" as "water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas, and *can* include formation water, injection water, and any chemical added downhole or during the oil/water separation process." 40 C.F.R. §§ 435.41(bb), 435.11(bb) (emphasis added). Fidelity argues that the CBM water is not "produced water" because Fidelity adds no chemicals to the water. Whether CBM water is "produced water," however, does not turn on the addition of chemicals or any other alteration. The EPA regulations provide that "produced water" *can* include added chemicals, but the definition does not require it. *See id.* CBM water is "produced water" because it is brought

up from the coal seams underlying Powder Basin to extract methane gas.

The CWA contemplates that produced water, as defined by EPA regulations, is a pollutant within the meaning of the Act. The CWA only exempts water derived from gas extraction from regulation when the water is disposed of in a well and will not result in the degradation of other water bodies. 33 U.S.C. § 1362(6)(B). *Cf. Cedar Point Oil,* 73 F.3d at 568 ("produced water" is a pollutant if its discharge does not meet exemption criteria). Fidelity disposes of the CBM water by direct discharge to the Tongue, not by reinjection into a state-approved well. Because Fidelity discharges "produced water" and does not meet § 1362(6) exemption criteria, the CBM water discharged by Fidelity is a pollutant within the plain meaning of the CWA and is subject to NPDES permitting requirements.

Third, concluding that CBM water is a pollutant is consistent with the CWA's definition of "pollution." *Cf. APHETI,* 299 F.3d at 1017 (considering the definition of "pollution" to determine whether biological materials emitted by mussels are "pollutants"). "Pollution" is the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). By discharging CBM water into the Tongue River, Fidelity alters the water quality of the Tongue River. In particular, the MDEQ, in the Montana Environmental Impact Statement analyzing the impact of CBM production on Montana waterways, cautions that the resulting alteration may degrade, and limit uses of, the receiving water: "Surface water quality in some watersheds would be slightly to severely degraded, resulting in restricted downstream use of some waters." Montana FEIS

at 4-72. And, unregulated discharge of CBM water to the Tongue River threatens to make the water unfit for irrigation. *Id.* at 4-138.

Because Fidelity's discharges of CBM water alter the water quality of the Tongue River, those discharges cause "pollution" as defined by the CWA. *See PUD No. 1 of Jefferson County. v. Wash. Dep't of Ecology,* 511 U.S. 700, 705, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) (citing 33 U.S.C. § 1313(d)(4)(B) and recognizing CWA's "antidegradation policy" requiring state water quality standards to prevent further degradation of the Nation's waters); 40 C.F.R. § 131.12 (antidegradation policy regulation). Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a "pollutant," even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly "undermine the integrity of [the CWA's] prohibitions." *APHETI,* 299 F.3d at 1016.

The district court determined that the CWA's definition of "pollution" supports a conclusion that CBM water is *not* a pollutant because Fidelity does not alter the CBM water before discharging it. We disagree with the district court's interpretation of the definition. The requirement that the physical, biological, or chemical integrity of the water be a "man-induced" alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man. *See Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.,* 280 F.3d 1364, 1368 (11th Cir.2002) ("[I]n determining whether pollutants are added to the navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water."). A contrary reading of the definition is

illogical because the goal of the CWA is to protect receiving waters, not to police the alteration of the discharged water. *See* 33 U.S.C. § 1251 (The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). Here, the alteration of the chemical integrity of the Tongue River is "man-induced," as the CBM water would not flow into the Tongue River but for Fidelity's methane extraction processes, and that must be a focus of our concern under the CWA. Contrary to the district court's conclusion, the definition of "pollution" supports a finding that CBM water *is* a pollutant.

In arguing that CBM water is not a pollutant, Fidelity makes much of the fact that the CBM water is "unaltered," "naturally occurring," and that it is only water. Fidelity relies on *APHETI* to argue that only those substances "transformed by human activity" can be pollutants under the CWA. *See APHETI,* 299 F.3d at 1017. Fidelity misapplies *APHETI.*

In *APHETI,* we clarified the meaning of "biological materials," a term included in the CWA's definition of "pollutant." *Id.* at 1016; *see also* 33 U.S.C. § 1362(6). In considering whether excrement from mussels suspended from rafts in Puget Sound was a pollutant under the CWA, we distinguished between biological materials that naturally occur in receiving waters, such as mussel feces, and biological materials that result from human activity, such as the "heads, tails, and internal residuals" of fish dumped back into the waters after processing. *APHETI,* 299 F.3d at 1017. Because one purpose of the CWA is to protect shellfish, we concluded that shellfish are not pollutants under the CWA unless human activity transforms them.

Id. This conclusion was necessary to preserve the "integrity of the [CWA's] prohibitions." *Id.* at 1016.

APHETI cannot sensibly be read to require human transformation of all materials identified in the CWA's definition of "pollutant." For one thing, the CWA definition of "pollutant" includes such terms as "rock," "sand," and "heat." *See* 33 U.S.C. § 1362(6). It is the introduction of these contaminants, not their transformation by humans, that renders them pollutants. Also, by allowing the degradation of the quality of receiving waters, the consequences of Fidelity's interpretation of *APHETI* would upset the integrity of the CWA, a result that *APHETI* was careful to avoid. Fidelity's interpretation of *APHETI* is not correct, for it would allow someone to pipe the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the CWA because the salt water from the Atlantic Ocean was not altered before being discharged into the fresh water of the Great Lakes. Or, water naturally laced with sulfur could be freely discharged into receiving water used for drinking water simply because the sulfur was not added to the discharged water. Such an argument cannot sensibly be credited.

Even though Fidelity argues that CBM discharges are "only water," other circuits have held that transporting water from one water body to another can violate the CWA. *See Miccosukee Tribe,* 280 F.3d at 1367 (affirming the district court's grant of summary judgment to the plaintiffs where the defendant discharged already polluted water into a navigable water even though the defendant did not introduce additional pollutants into the discharged water but only rerouted the discharged water into the receiving water); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481, 492-93

(2d Cir. 2001) (concluding that the transfer of water containing pollutants from one body of water to another requires an NPDES permit); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir.1996) (holding that the transfer of water from one body of water to another distinct body of water requires a NPDES permit where the discharged water contains pollutants).

Fidelity attempts to distinguish these cases because they addressed the issue of whether there was an "addition" of a pollutant under the CWA, not whether there was a pollutant. This distinction is inapposite. The issue of whether CBM water is a pollutant is practically indistinguishable from the issues considered by these cases. Fidelity is transporting water from the deep aquifers of the Powder Basin and discharging that unaltered water into the surface water of the Tongue River. Similarly, each of the cases cited above involve transport of water that could degrade the water quality of receiving waters. The cases apply insofar as they reject the argument that discharge of water cannot be a pollutant simply because the discharged water is unaltered and transported from one body of water to another.

In light of the CWA's definition of pollutant and pollution, our precedent in *APHETI,* and the conclusions of other circuits in analogous cases, we reject Fidelity's arguments and hold that CBM water is a pollutant pursuant to the CWA.

III

Having concluded that Fidelity's discharge of CBM water is subject to the CWA, we next consider whether Fidelity nevertheless can be relieved of permitting under

the CWA by Montana state law. Section 75-5-401(1)(b) of the Montana Code provides:

> Discharge to surface water of groundwater that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part if:
>
> > (i) the discharge does not contain industrial waste, sewage, or other wastes; (ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and (iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters.

Based on Montana Code section 75-5-401(1)(b), the MDEQ advised Fidelity that no permit was needed to discharge CBM water into the Tongue River. The district court agreed, reasoning that the EPA implicitly approved of Montana's groundwater exemption because the EPA did not revoke Montana's authority to operate the EPA-approved state permitting program despite section 75-5-401(1)(b). Giving deference to the EPA's "approval" of Montana's permitting program, the district court concluded that discharge of CBM water does not require a permit under Montana state law and thus does not violate the CWA. We disagree with the district court's conclusion for several reasons.

First, though the district court reasoned that the EPA approved of section 75-5-401(1)(b), the EPA does not have the authority to exempt discharges otherwise subject to the CWA. Only Congress may amend the CWA to create exemptions from regulation. *See Am. Mining Congress v.*

E.P.A., 965 F.2d 759, 772 (9th Cir.1992) (citing *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1374 (D.C.Cir. 1977)). The EPA could not have approved of the MDEQ's exemption of CBM water discharges under section 75-5-401(1)(b) even if the EPA wanted to do so.[4]

Second, Montana has no authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process. *See* 33 U.S.C. § 1370 (states may not adopt or enforce standards that are less stringent than federal standards). Just as the EPA does not have the authority to create an exemption for unaltered groundwater, neither does the State of Montana, as the EPA cannot delegate to a state more authority than the EPA has under the CWA.[5]

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[4] Judicial deference to agency action is not warranted where the agency had no authority to act. *See United States v. Mead*, 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (*Chevron* deference applies only when Congress explicitly or implicitly gave the agency authority to fill certain gaps left by Congress). Therefore, the district court erred in giving judicial deference to the EPA's implicit "approval" of Montana's groundwater exemption. Congress did not grant the EPA the authority to create such exemptions.

[5] Even if the EPA could have approved of the MDEQ's application of section 75-5-401(1)(b), the EPA did not do so here. In a letter sent to the MDEQ, the EPA disapproved of the application of section 75-5-401(1)(b) to discharges that would otherwise be regulated under the CWA. The MDEQ, however, maintained that the exemption was consistent with the CWA because "discharges of unaltered, natural groundwater do not contain 'pollutants' as that term is defined" in the CWA. In a subsequent letter to the MDEQ, the EPA stated that revocation of Montana Code section 75-5-401(1)(b) would not be necessary *if* the MDEQ does not interpret that provision to authorize "any point source discharge of any pollutant to any water of the United States without an NPDES permit."

Moreover, absent statutory authority in the CWA for Montana to create such exemptions, it cannot possibly be urged that Montana state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2. *See also Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 851 (9th Cir.2002) (recognizing that the Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law").

We hold that Montana state law cannot exempt CBM water from being subject to the CWA when the Act does not provide the EPA or the State of Montana the authority to create such exemptions.

IV

Because CBM water is a pollutant subject to regulation by the CWA and because Montana cannot create an exemption for CBM water that is otherwise subject to the CWA, we reverse the district court's grant of summary judgment to Fidelity and remand with instructions to enter summary judgment for NPRC.

REVERSED and REMANDED.

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA –
GREAT FALLS DIVISION

NORTHERN PLAINS RESOURCE COUNCIL, INC. Plaintiff, v. FIDELITY EXPLORATION & PRODUCTION CO., INC. Defendant	**JUDGMENT IN A CIVIL CASE** **CV-00-105-BLG-SEH** (Filed Aug. 23, 2002)

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__x__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to record made in open court August 23, 2002, plaintiff's motion for Summary Judgment on Counts I and II of the Amended Complaint is DENIED.

Defendant's motion for Summary Judgment for failure to establish violation of the Clean Water Act is GRANTED.

August 23, 2002 PATRICK DUFFY., CLERK

(date) /s/ Leslie Vaskey, Deputy Clerk

By: Leslie Vaskey, Deputy Clerk

FILED, ENTERED & NOTED IN CIVIL JUDGMENT BOOK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NORTHERN PLAINS RESOURCE COUNCIL, INC., Plaintiff, vs. FIDELITY EXPLORATION & PRODUCTION CO., INC., Defendant.	No. CV-00-105-BLG-SEH **ORDER** (Filed Aug. 23, 2002)

Pursuant to the record made in open court on August 23, 2002,

ORDERED,

1. Plaintiff's Motion for Summary Judgment[1] on Counts I and II of the Amended Complaint is DENIED.

2. Defendant's Motion for Summary Judgment[2] for failure to establish violation of the Clean Water Act is GRANTED.

3. Defendant's Motion for Summary Judgment for failure to properly invoke jurisdiction is DENIED as moot.

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[1] Docket # 117.

[2] Docket # 111.

4. Plaintiff's Motion to Bifurcate Liability and Damages[3] is DENIED as moot.

DATED this 23rd day of August, 2002.

/s/ Sam E. Haddon
SAM E. HADDON
United States District Judge

[3] Docket #120.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NORTHERN PLAINS
RESOURCE COUNCIL,

Plaintiff,

-vs-

Civil Docket
No. 00-105-BLG-SEH

REDSTONE GAS PARTNERS,

Defendant.

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
Heard in Courtroom No. 209
Federal Courthouse
215 First Avenue North
Great Falls, Montana
August 23, 2002
11 a.m.

BEFORE THE HONORABLE SAM E. HADDON
UNITED STATES DISTRICT JUDGE

TINA C. BRILZ, RPR, FCRR
Official Court Reporter
United States District Court
215 First Avenue North – P.O. Box 2186
Great Falls, Montana 59401-2186

Proceedings recorded by mechanical stenography, transcript produced by computer.

[2] APPEARANCES:

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* * *

[37] THE COURT: Yes.

Well, I do want to address this Sierra Club versus Cedar Point Oil case, because that case, as I said during the course of argument, is a case that the court has looked at with some substantial care.

And at first blush, it appeared to me that the Cedar [38] Point Oil case might be dispositive of the issues in this case. But upon further analysis of that case, it was my

conclusion that produced water, which is a defined term by regulation, in that case was not water that existed in the form in which it would have been said to have been present naturally before it was brought to the surface. The opinion of the Fifth Circuit recites, among other things, that during extraction, chemicals used in the drilling process become mixed with the water. And the definition of produced water as established by the Environmental Protection Agency describes produced water as water and particulate matter associated with oil and gas producing formations. Produced water includes small volumes of source water and treatment chemicals that return to the surface with the produced formation fluids, and so forth.

My conclusion is that produced water there is, as stated, a defined term. And it contains materials that were added in the production process. And I have concluded that what we have here is not the equivalent of produced water, because the water that we have in this case by all the record before the court is water in a natural state, without some sort of injection of materials by any production process.

I have concluded, as counsel have acknowledged, that there isn't any specific provision in the act that defines [39] this coal bed water as a pollutant. And if I am to find that coal bed water or the chemicals within it constitute a pollutant, I have to conclude that the act is to be read to allow the definitions of pollutant that are contained in the act to be expanded by regulation promulgated by the administrator pursuant to 33 United States Code Section 3161(a).

And that is the starting point of my analysis of this particular issue.

And I cannot – whether I personally would choose the language that Congress chose or not at any level, at any part of this statute, is beside the point. My personal views about the wisdom of this legislation, the manner in which it was written, the clarity of its language, or the lack of clarity, is irrelevant.

That's not my job. My job is not to second-guess the Congress. My job is to apply the law that Congress has written regardless of what I may personally think of it.

And my conclusion is that since pollutant is a defined term in the statute, and applying the rules of statutory construction that I have determined that I must follow, that I cannot, and in fact I do not read 3161(a) as giving to the secretary the authority to expand upon the definition of pollutants. Pollutant is a defined term. And what the statute has declared to be a pollutant is what this court [40] finds to be a pollutant.

And in reaching that conclusion, I have taken the statute as it's written. I've not added anything to it. And I've tried not to take anything away from the language chosen. There is a well-accepted rule of construction of statutes that the court is to apply the proposition that to define a particular term is to likewise limit its definition to that which is stated. And the United States Supreme Court has spoken on this subject, and I take guidance from what the court said there in the case of Colautti versus Franklin. Different set of circumstances. The case is reported at 439 United States 379.

But the proposition is clearly stated by the Supreme Court with cited reference: "A definition which declares what a term means, excludes any meaning that is not stated." And that's the rule I'm applying here.

And having made that application of that particular rule, I cannot reach the conclusion that the secretary had the authority to expand the definition.

And in looking at this whole picture, I've also looked at another section of the code which I found to provide some guidance on this whole issue, and that's another provision contained in Section 33-1362, subdivision 19 there.

I'll find that to quote it for you here in just a moment. And that's the provision that deals with the [41] definition of what is pollution. And the statute reads: "The term pollution means the man-made or man-induced alteration of a chemical, physical, biological, and radiological integrity of water."

The plain language of that statute requires, as I read it, that there be some man-made or man-induced alteration of one of these qualities, chemical, biological, or radiological integrity of the water, in order for there to be pollution of water.

And here the water is, by agreement of the parties, in an unaltered state. There's been no alteration of its chemical properties, which are what are the components that are in issue here, by any man-made or man-induced forces. And I conclude that there is no pollution, as defined in the statute, of this water.

And I conclude that natural, unaltered groundwater cannot be said to be polluted water, because it doesn't fit the definition of polluted water. And similarly, I cannot draw any conclusion that the addition of water that is by definition not polluted water can be said to cause pollution.

Now, I've looked at all of these cases and read them all, I believe. And after assessing their relative facts, it appears to me that the case that is most closely on point on this particular issue is this District Court case out of [42] the District of New York reported at 800 F. Supp. 1113, Bettis versus the Town of Ontario. And Judge Larimer in that case very succinctly stated what, in the view of this court, is an accurate definition of the statute: "The Clean Water Act makes unlawful the discharge of any pollutant by any person. Pollutants include solid waste, various other specified types of matter discharged into water. Water itself, however, is not a pollutant. And simply moving water from one place to another does not constitute the discharge of pollutant under the act."

So my conclusion on this issue is that unaltered groundwater is not a defined pollutant under the Clean Water Act. That it's not embraced with any of the other terms in 33 United States Code Section 1362(6). And it cannot be held to be a pollutant for purposes of the permit required by Section 33-1342.

But my analysis of this issue did not end at that point, because there is, in the view of the court, this very significant question of the interrelationship between federal program and state program.

And I want to address that issue, because it is a part of my basis for my ruling.

The program that exists in Montana is directly tied to the authorization to create such a program extended by the federal law as contained in Section 1362 subdivision (b).

[43] And the process that's spelled out in the statute is clear. There must be an application made consistent with the federal law. And there is a requirement, an affirmative requirement of approval of the state program by the feds before it can be implemented.

And there's no question but that the state program must meet the federal guidelines. That's spelled out in 1362(c) (2). And on this record that I have before me, there isn't any – there's no issue that the Montana program was approved. In order to have been approved, it had to meet the federal requirements. There's no issue that suggests that the Montana program has been revoked. And I read the federal statute to require very specifically that if there is to be a revocation of the state program, that affirmative action by the federal government is required to accomplish that task.

The federal regulations speak to this issue as well. And the record is clear, regardless of what action may be argued that the government should have taken to revoke Montana's program, it did not and has not revoked Montana's program.

And Mr. Tuholske, I have read with interest what the people who worked for the federal government said in letters written to the state. But it is a reality that no federal agent has any more authority than that which is given to him [44] by law. And the law, as I have read it in this case, absolutely requires if the state program is to be declared to be invalid, that the fed – federal program be implemented by taking affirmative action.

Now, whether the federal program should have undertaken affirmative action against the State of Montana is not the issue before me, and I can't make any assessment of that; and I offer no opinion on that.

But I do read the statute as requiring affirmative action to withdraw the permit, and that has not occurred.

Now, where does that leave us? Well, in my judgment, it leaves us with these given propositions that are applicable in this case.

The Clean Water Act establishes the standards that the state must follow; that the state can be approved for implementation of those standards and application of those standards to waters within its boundaries, only if it's approved by the EPA; that, in this case, such an approval was obtained; and on this record, it remains an approved program.

The state's program, if it is approved, in my judgment under the law, becomes the eyes, the ears, and the operative hands of the federal government.

And the Montana program, in my opinion, is in substance [45] an approved extension and operation of the federal program, and that it does not in this circumstance exist separately and apart as a stand-alone state-law-only program. It is an approved extension and operation of the federal program, and in substance, is one and the same as the federal program until such time as its approval is revoked.

And on this record, I conclude that the state program met the federal criteria and standards. And that the state – The EPA interpreted, and through the state as its

designated operative entity, approved the actions taken by the Montana Department of Environmental Quality in not requiring permits for the operations that discharged into the Tongue River.

And I have to give deference to the EPA's ultimate position regardless of statements made by persons working for that agency. I must look at the position it took. And the position it took was one of not contesting what Montana was doing by withdrawing the permit authority.

And I further find that if the EPA believed that the permit exemption that was accorded by the state agency to this CBM water was wrong, it had the affirmative obligation to undertake to withdraw the state's authority to act. And it did not do so.

And it also appears to me that this interpretation that existed is a further support for conclusion that CBM water [46] is not a pollutant under the act. And its discharge would not require a permit.

And even if it could be said that CBM water is a pollutant, and I want to make specifically clear that I do not so find, I find that its discharge in its unaltered form does not, under the federal law, that is, under the Clean Water Act as administered through the approved state program, require a permit.

And regardless of whether CBM water could be said to be a pollutant, its discharge without a permit was lawful under the state's approved 33 United States Code Section 1342 program; and consequently, discharges pursuant to that program were not in violation of 33 United States Code Section 1311. That is my ultimate conclusion on the issue.

If no permit is required, the fact that permits were obtained or the reasons for obtaining the permits, in my judgment, are irrelevant.

And given my conclusion and ruling on that core issue, it's not necessary that I reach or decide the defendant's standing issues or the jurisdictional issues, and I'm dismissing those motions as moot.

My conclusion and my ruling is that the defendant is entitled to summary judgment dismissing plaintiff's complaint as to Counts One and Two. And the motion to bifurcate liability and damages is denied as moot.

[47] Counsel, I want to make clear to all in this courtroom that this is a decision based upon my view of what the law requires this court to rule, given the law as written. It has within it and should be interpreted as having within it no editorial comment about the wisdom of any part of this program.

That's my ruling.

Counsel there will not be a written opinion on this matter. There will be a short order issued that will summarize the substantive rulings that the court has made based upon the record made here in open court.

Again, I want to thank you for your good work on both sides in bringing this matter to the court's attention in the fashion that you did and in the good work that was done on the briefing by all parties.

Thank you very much.

The Court is in recess.

(The proceedings in this matter were adjourned at 12:19 p.m)

SUPREME COURT OF THE UNITED STATES
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WILLIAM K. SUTER
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479-3011

June 20, 2003

Mr. Jon Metropoulos
Gough, Shanahan, Johnson
PO Box 1715
Helena, MT 59624

Re: Fidelity Exploration and Production Company v. Northern Plains Resource Council, Inc. Application No. 02A1078

Dear Mr. Metropoulos:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on June 20, 2003, extended the time to and including August 8, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Clayton R. Higgins, Jr.

Clayton R. Higgins, Jr.
Assistant Clerk

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(2)

No. 03-257

In The
Supreme Court of the United States

FIDELITY EXPLORATION & PRODUCTION COMPANY,

Petitioner,

v.

NORTHERN PLAINS RESOURCE COUNCIL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the discharge into a navigable river or stream of contaminated groundwater generated as the waste byproduct of an industrial process, resulting in the addition to the waters of the United States of pollutants not previously present in such waters, requires an NPDES permit under the Clean Water Act.

2. Whether, in light of the significant differences between this case and *South Florida Water Management District v. Miccosukee Tribe of Indians*, No. 02-626, there is any reason for this Court to "hold" this petition pending its disposition of that case.

CORPORATE DISCLOSURE STATEMENT

Respondent Northern Plains Resource Council, Inc., is a Montana non-profit membership corporation. It does not issue shares of stock and has no corporate parents.

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INTRODUCTION

Although petitioner Fidelity Exploration & Production Company asks this Court to grant certiorari in this case, the only real issue presented by the petition for certiorari is whether it should be held pending this Court's disposition of *South Florida Water Management District v. Miccosukee Tribe of Indians*, No. 02-626. Fidelity contends that this case presents the same issue on which the Court granted certiorari in *Miccosukee*, and it relies on precisely the same asserted conflict among the circuits that was the subject of the petition for certiorari in *Miccosukee*. Nowhere does Fidelity's petition suggest any reason why this Court should hear this case *in addition* to hearing *Miccosukee*, in which it has already granted certiorari to resolve the issue Fidelity claims this case presents. Thus, even if all of Fidelity's arguments were taken at face value, the consequence would not be a grant of certiorari in this case, but rather deferral of consideration of Fidelity's petition pending the decision in *Miccosukee*.

But Fidelity's arguments should not be taken at face value. There is a major difference between the issue presented in this case and that in *Miccosukee*: In *Miccosukee*, the question is whether pumping already contaminated water from one body of navigable water to another constitutes the "addition" of pollutants to navigable waters of the United States within the meaning of the Clean Water Act ("CWA"). In this case, by contrast, pollutants *not* already present in *any* navigable waters are being added to navigable waters when, as a byproduct of the industrial process of coal bed methane extraction, contaminated groundwater that would not otherwise reach any navigable body of water is discharged into navigable rivers and streams. Resolution of the issue in *Miccosukee* in favor of

the petitioners in that case therefore would not control the outcome of this case. Indeed, Fidelity did not even raise the *Miccosukee* "addition" issue below; its contention was only that its wastewater was not a "pollutant" at all – an issue not present in *Miccosukee*.

Moreover, none of the cases relied on by Fidelity (or by the petitioner in *Miccosukee*) holds that an NPDES permit is not required when pollutants not already present in navigable waters are added to navigable waters as the result of an industrial discharge of groundwater. There is not even any arguable conflict among the circuits over the issue actually decided by the Ninth Circuit: namely, whether wastewater produced by oil and gas drilling is a "pollutant" under the Clean Water Act. Indeed, in the only appellate decision that has addressed the issue, *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), the Fifth Circuit held, consistent with the Ninth Circuit ruling below, that such "produced water" is a "pollutant." And unlike in *Miccosukee*, where the federal government supports the petitioner's position that pumping between navigable waters is not subject to the NPDES permit requirement, the EPA has rejected the position of the petitioner in *this* case, and has taken the position that industrial discharges of contaminated groundwater into navigable waters do require a permit. Thus, not only is the question presented in *Miccosukee* not controlling here, but there is also no independent reason for the Court to consider the different issue this case presents.

Accordingly, the proper disposition of this petition is neither to grant it nor to hold it pending the disposition in *Miccosukee*, but to deny it now.

STATEMENT OF THE CASE

This case is a Clean Water Act "citizen suit" brought by respondent Northern Plains Resource Council ("Northern Plains"), a grassroots conservation and family agriculture group dedicated to protecting Montana's water quality and family farms and ranches. Petitioner Fidelity Exploration & Production Company is engaged in the commercial production of natural gas in the West. The suit challenges Fidelity's unpermitted discharges of contaminated groundwater generated by the production of coal-bed methane gas into the Tongue River and one of its tributaries, Squirrel Creek, in southeastern Montana. Coal-bed methane is natural gas that occurs together with groundwater in the interstices of underground coal seams. The production of coal-bed methane involves pumping the groundwater and gas to the surface, where the gas separates from the water. Fidelity's facility at issue here is the CX Field, encompassing nearly 250 wells, and associated pipelines, compressor stations, electrical lines and other facilities.

The wastewater that Fidelity produces through this process (referred to as "CBM water") contains numerous contaminants, including suspended solids, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, fluoride, aluminum, arsenic, barium, beryllium, boron, copper, lead, iron, manganese, strontium, and radium. As the Ninth Circuit recognized, CBM water is over three times more salty than the Tongue River in its natural state, and it has a sodium adsorption ratio (SAR)

40-60 times higher than the Tongue.[1] If it were not pumped to the surface in Fidelity's methane production process, the coal-bed methane water would have no way of reaching surface bodies of water, with which it lacks any hydrological connection.

Though Fidelity lauds the virtues of its CBM wastewater, Pet. 3, all of the water at issue here is, or was, discharged into the Tongue River, or its tributary Squirrel Creek, as an unwanted byproduct of its commercial gas extraction operation. Fidelity's wastewater is not used for agricultural purposes, and irrigators do not want it. Southeastern Montana is an arid land, and the area's farmers and ranchers are dependent on high quality irrigation water from the Tongue to sustain their operations. All of the major holders of irrigation water rights on the Tongue have, from the outset, opposed Fidelity's discharges.[2]

Northern Plains' farmer and rancher members are concerned about Fidelity's discharges because the salts

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[1] SAR is the ratio of sodium to calcium and magnesium in water. The SAR of the Tongue is generally less than 1. CBM wastewater, according to Fidelity's data, has an SAR that averages 47. The state of Montana has just adopted water quality standards for the Tongue River for SAR that range from 3 to 4.5 depending on the season. Montana determined that these standards were necessary to protect agriculture from the impacts of CBM discharges. A.R.M. § 17.30.670 (2003).

[2] In addition to the many Tongue River irrigators that are members of Northern Plains, the two major water right holders on the Tongue, the Tongue River Water Users Association and the T&Y Irrigation District, appeared as *amici curiae* supporting Northern Plains before the Ninth Circuit. In addition, the Northern Cheyenne Tribe, another principal water right holder on the Tongue, also filed an *amicus* brief in support of Northern Plains.

and heavy metals with which they are laden are deleterious to crops, soils and aquatic life. The harmful impact of accumulated salts in soils used for growing crops is an age-old problem, and one that Western farmers must confront each season. CBM water is thus dangerous for irrigators: "[H]igh SAR water, like CBM water, causes soil particles to unbind and disperse, destroying soil structure and reducing or eliminating the ability of the soil to drain water." Pet. App. 4a. The irrigated alfalfa fields and family gardens of the Tongue River valley, because they contain "clayey" soils, are particularly susceptible to SAR damage. Even Fidelity's own expert opined that "the SAR of CBM water creates a permeability hazard and precludes its use for irrigation without mixing, treatment or addition." Pet. App. 4a. The Montana Department of Environmental Quality (MDEQ) also warns that the unregulated discharge of CBM water would cause "[s]urface water quality in some watersheds [to] be slightly to severely degraded . . . " Pet. App. 4a-5a.

In August 1998, Fidelity informed the Montana Department of Environmental Quality that it wished to discharge the wastewater from its coal-bed methane operations into the Tongue River and Squirrel Creek. The Department informed Fidelity that under a Montana statute, a discharge of groundwater that was not altered from its ambient quality did not require a permit. However, the Department also informed Fidelity that the EPA had taken the position that the CWA did not permit the state to exempt such discharges from the requirement of a permit under the National Pollutant Discharge Elimination System (NPDES).

Even in the face of the information that the EPA considered such unpermitted discharges unlawful, Fidelity

chose to proceed with discharges to both the Tongue River and Squirrel Creek without first obtaining a permit. In December, 1999, Fidelity evidently reconsidered the wisdom of this course of action and applied for a permit, but continued the unpermitted discharges pending action on its application. In June, 2000, respondent Northern Plains, on behalf of ranchers and farmers that use surface waters in the vicinity of Fidelity's operations, filed a citizen suit under the CWA alleging that Fidelity had engaged in unpermitted discharges to the Tongue River and Squirrel Creek. At around the same time, Montana's DEQ issued an NPDES permit for discharges to the Tongue River, and denied a permit for Fidelity's discharges to Squirrel Creek. Northern Plains subsequently amended its complaint to allege additional unpermitted discharges when Fidelity continued to discharge CBM water into the Tongue River from outfalls not covered by the permit.

The district court granted summary judgment to Fidelity, holding that the CBM water discharged by Fidelity was not a "pollutant" under the CWA because Fidelity had not altered it from its natural state. The issue Fidelity raises here, whether Fidelity's activities constituted an "addition" or "discharge," was not raised below. The court also held that because EPA had not revoked Montana's entire permitting program under the CWA, the state statute purporting to exempt discharges of unaltered groundwater from the permit requirement was effective even if it would otherwise violate the CWA.

On appeal, a unanimous panel of the Ninth Circuit reversed. The court began by observing that "[t]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342." Pet. App.

8a. Given the parties' agreement that Fidelity had discharged its wastewater from a point source into navigable waters without a permit, the court stated, "we need only decide whether the groundwater derived from CBM [coalbed methane] extraction is a 'pollutant' within the meaning of the CWA." *Id.*

The court began its analysis with the statutory definition of "pollutant":

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and *industrial,* municipal, and agricultural *waste* discharged into water. This term does not mean . . . water, gas, or other material which is injected into a well to facilitate production of oil and gas, *or water derived in association with oil or gas production and disposed of in a well,* if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

Pet. App. 8a (quoting 33 U.S.C. § 1362(6)) (emphasis added by the court). The court held, first, that the water discharged by Fidelity fell easily within this definition because it was "industrial waste" – that is, the "useless byproduct derived from the commercial production and sale of goods and services." Pet. App. 10a. The court reasoned: "Because Fidelity is engaged in production of methane gas for commercial sale and because CBM water is an unwanted byproduct of the extraction process, CBM

water falls squarely within the ordinary meaning of 'industrial waste.'" *Id.*

Second, the court relied on an EPA regulation defining the term "pollutant" to include "produced water," or "water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas" (40 C.F.R. §§ 435.41(bb), 435.11(bb)). Pet. App. 11a.[3] The court noted that the CWA only exempts such produced water from the permit requirement "when the water is disposed of in a well and will not result in the degradation of other water bodies." *Id.* (citing 33 U.S.C. § 1362(6)(B)). Agreeing with the Fifth Circuit's decision in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d at 562-69, the court held that "produced water" as defined by EPA meets the statutory definition of a "pollutant."

Third, and least significant to its decision, the court noted that considering Fidelity's wastewater a "pollutant" was "consistent with the CWA's definition of 'pollution'" as the "man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water."[4]

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[3] Petitioner notes that the definition referenced by the Ninth Circuit for the term "produced water" is contained in Subcategories A and D ("Offshore" and "Coastal"), rather than in Subcategory C ("Onshore") of the Oil and Gas Extraction Point Source Categories set forth in 40 C.F.R. § 435. *See* Pet. 20 n. 9. However, what Petitioner does not mention is that while Subcategory C "Onshore" *uses* the term "produced water," it does not define that term. 40 C.F.R. § 435.31-32. The Ninth Circuit reasonably referred to the preceding and following subcategories within the same Part for the definition of the term.

[4] Indeed, the appellate court's discussion of the term "pollution," was prompted by the need to correct the district court's misapplication of the term to the discharged industrial wastewater, rather than to the

(Continued on following page)

Pet. App. 11a (citing 33 U.S.C. § 1362(19).). The court pointed out that although Fidelity had not altered the integrity of the pumped groundwater, it had altered the integrity of the receiving stream; and, citing the Eleventh Circuit's decision in *Miccosukee*, the court noted that the requirement of a "man-induced" alteration "refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man." Pet. App. 12a (citing *Miccosukee Tribe v. South Florida Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002)).

The court further observed, in response to Fidelity's assertion that it was discharging "only water," that "other circuits have held that transporting water from one water body to another can violate the CWA." Pet. App. 14a-15a (citing *Miccosukee Tribe*, 280 F.3d at 1367; *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492-93 (2d Cir. 2001); *Dubois v. Department of Agriculture*, 102 F.3d 1273, 1299 (1st Cir. 1996)). The court acknowledged that, as Fidelity had pointed out, those cases involved whether there was an "addition" of pollutants to the waters of the United States, not the definition of "pollutant," but the court saw the cases as "practically indistinguishable" insofar as they necessarily presupposed that the discharged water was (or contained) a "pollutant." Pet. App. 15a.

Finally, in a portion of its ruling not challenged by Fidelity here, the court rejected the district court's holding that because EPA had "approved" Montana's permitting

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receiving water, where the "pollution" causes adverse impacts on water quality.

scheme, the Montana statute that purported to exempt Fidelity's discharges of unaltered groundwater from the permit requirement was effective even if the wastewater was a "pollutant" under the CWA. The court held that neither EPA nor Montana had authority to exempt discharges of pollutants for which the CWA requires a permit.

In accordance with these holdings, the Ninth Circuit reversed the grant of summary judgment for Fidelity and remanded the case for entry of summary judgment on liability in favor of Northern Plains.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT THE ISSUE BEFORE THE COURT IN *MICCOSUKEE*.

A. Unlike *Miccosukee*, This Case Involves the Addition to Navigable Waters of Pollutants Not Previously Present in Any Navigable Waters.

The CWA requires an NPDES permit for the "discharge of any pollutant," and goes on to define "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311(a), 1362(12). Thus, for a permit to be required, "five elements must be present: (1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Fidelity stipulated before the District Court that Northern Plains satisfied all of these elements save for whether CBM wastewater is a "pollutant." Therefore both the District Court and the Ninth Circuit focused their opinions on whether CBM wastewater is a "pollutant" as

defined in 33 U.S.C. § 1362(6). Fidelity did not address the "addition" issue that is the basis for *Miccosukee* nor did it cite the principal cases it now relies upon. As discussed in Section I B, *infra.*, Fidelity's failure to raise below the issue it now relies exclusively upon is grounds alone for denying the Petition. That fact notwithstanding, *Miccosukee* raises an issue that is not present in this case.

The issue before this Court in *Miccosukee* is whether the pumping of polluted water from one navigable body of water to another, adjoining body of navigable water constitutes the "addition" of a pollutant to navigable waters. The petitioner in *Miccosukee* sought review of that issue by this Court to resolve an arguable conflict over this issue between two lines of appellate decisions.

One line of cases, consisting of the D.C. Circuit's opinion in *Gorsuch* and the Sixth Circuit's decision in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), held that when polluted water was discharged from a dam or impoundment into a downstream water body, there was no "addition" of pollutants, because the pollutants were already present in "navigable waters." According to the analysis of these cases (which the petitioner in *Miccosukee* endorses), "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world," and "the point or nonpoint character of pollution is established *when the pollutant first enters navigable water*, and does not change when the polluted water later passes . . . from one body of navigable water . . . to another. . . . " *Gorsuch*, 693 F.2d at 175 (emphasis added); *see also Consumers Power*, 862 F.2d at 584.

The other line of cases, comprising the Eleventh Circuit's decision in *Miccosukee* as well as *Dubois v. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), and *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001), held that when polluted water was transferred (through a point source) from one body of navigable water to another, separate body of water, there was an "addition" of pollutants to navigable waters.[5]

The issue that is posed in *Miccosukee*, and that at least arguably divided the courts of appeals, is not present in this case. Unlike the cases relied on both by the petitioner in *Miccosukee* and Fidelity here, this case involves a point source from which the relevant pollutant, in the words of the *Gorsuch* court, "first enters navigable water" from "the outside world." 693 F.2d at 175. Until Fidelity discharged its contaminated wastewater into the Tongue

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[5] The courts in the second line of cases distinguished the first line on the ground that the bodies of water at issue in the first line were not actually separate: *Gorsuch* involved a discharge of water through a dam from a river upstream to the same river downstream, and *Consumers Power* involved pumping water from Lake Michigan into an impoundment and then back to Lake Michigan through a power generation facility. Thus, at least arguably, the receiving body of water in those cases got no pollutants that were not already present in it. In recommending that the Court not grant certiorari in *Miccosukee*, the Solicitor General accordingly took the view that there was no direct conflict (*see*, Brief for the United States as Amicus Curiae, No. 02-626 (filed May 30, 2003)). In granting certiorari, however, this Court apparently concluded that the tension among the cases was sufficient to merit review, and the brief on the merits of the United States now takes the position that "the distinction suggested by those courts is unsound." Brief for the United States as Amicus Curiae Supporting Petitioners, No. 02-626, at 18 (filed Sept. 10, 2003).

River or Squirrel Creek, that polluted water was not present in any "navigable waters" – it was confined to coal bed seams lacking any hydrological connection to navigable lakes, rivers, streams or ponds. Thus, under the analysis of either the *Gorsuch* line of cases or the *Miccosukee* line, Fidelity's discharge of industrial wastewater to navigable waters constituted an "addition" to navigable waters of pollutants that were not previously present in any navigable waters. In other words, whichever view of the issue the Court selects in *Miccosukee*, the outcome of this case will not be affected.

The merits brief of the United States in *Miccosukee* makes this point crystal clear. Summarizing the statutory argument for finding no "addition" of pollutants on the facts of that case, the government's brief states:

> Section 502(12) makes clear that, in order to qualify as a "discharge of a pollutant," the activity must add a pollutant from a "point source" to "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. 1362(12); see CWA § 502(7), 33 U.S.C. 1362(7); 40 C.F.R. 122.2. Section 502(12) cannot reasonably be understood to include an activity that merely transports navigable waters from one location, through a "point source," to another location. Such an activity can conceivably lead to changes in water quality, but it does not, within the normal meaning of the relevant terms, constitute an "addition" of any pollutant to "the waters of the United States." See *Webster's Third New International Dictionary* 24 (1993) (defining "addition" in relevant part, as "the joining or uniting of one thing to another"). Whatever pollutants the waters contain are already *in* "the waters of the United States" when those waters pass through

> the "point source." The point source merely conveys those waters, which retain their status as navigable waters.

Brief for the United States as Amicus Curiae Supporting Petitioners, No. 02-626, at 16 (filed Sept. 10, 2003). This argument, even if this Court accepted it in *Miccosukee*, would cast not the slightest doubt on the outcome in this case. Indeed, it would only confirm the Ninth Circuit's holding, for the discharge to a navigable stream of polluted water not previously present in any navigable waters would, "within the normal meaning of the relevant terms, constitute an 'addition' of [a] pollutant to 'the waters of the United States.'" *Id.*[6]

B. Fidelity Did Not Raise the "Addition" Issue Below.

That the issue in *Miccosukee* is entirely distinct from that presented by this case is underscored by the fact that, in the courts below, Fidelity did not even *argue* the *Miccosukee* issue. That is, it did *not* argue that, if its contaminated groundwater constituted or contained a pollutant, there was no "addition" of that pollutant to navigable waters. Rather, the only issue it argued as to the applicability of the CWA to its discharges was that the discharges

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[6] Notably, the Solicitor General cited the Ninth Circuit's decision with approval in its brief opposing certiorari in *Miccosukee*, *see*, Brief for the United States as Amicus Curiae, No. 02-626, at 14-15 (filed May 30, 2003). Its merits brief in *Miccosukee*, while criticizing *Dubois* and *Catskill Mountains* (*see*, Brief for the United States as Amicus Curiae Supporting Petitioners, No. 02-626, at 18-19 (filed Sept. 10, 2003)), studiously avoids any similar criticism (or mention) of the decision in this case below.

did not involve a "pollutant." Indeed, in the district court, Fidelity stipulated that all the elements necessary to require a permit under the CWA were present except for the claimed absence of a "pollutant." Fidelity agreed with the District Court that the issue for determination was whether CBM water is a pollutant within the meaning of 33 U.S.C. § 1362(6). And in the Ninth Circuit, Fidelity did not even cite the principal authorities relied on in its petition (*Gorsuch* and *Consumers Power*), and it argued that *Miccosukee*, *Dubois* and *Catskill Mountains* were *irrelevant* because they only involved the "addition" issue, and not the definition of "pollutant."[7]

Having bypassed the "addition" issue below, Fidelity cannot now resurrect it as a basis for jumping onto the *Miccosukee* bandwagon. This Court will not grant relief on the basis of issues neither presented nor decided below. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2002). Thus, even if the issue to be resolved in *Miccosukee* did have a bearing on the proper outcome of this case (which it does not), petitioners waived any entitlement to benefit from this Court's resolution of that issue by failing to raise it (and, indeed, affirmatively asserting its irrelevance) below.

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[7] The Ninth Circuit's observation that those cases were "practically indistinguishable," which Fidelity repeatedly takes out of context, meant only that they presupposed that at least some of the discharges at issue in them involved a "pollutant" (as did *Gorsuch* and *Consumers Power*), *not* that this case involved the same issue regarding "addition" as those cases.

II. THE NINTH CIRCUIT'S DECISION THAT FIDELITY'S DISCHARGES INVOLVE A "POLLUTANT" WAS CORRECT, CONFLICTS WITH NO OTHER APPELLATE AUTHORITY, AND DOES NOT MERIT REVIEW BY THIS COURT.

A. The Decision is Correct.

The issue actually decided by the Ninth Circuit – that the contaminated wastewater discharged by Fidelity into the rivers and streams of Montana is a "pollutant" – also does not merit review by this Court. To begin with, that decision is, under the plain terms of the statute, correct. As the Ninth Circuit explained, the statute expressly provides that the term "pollutant" includes "industrial waste," and the contaminated wastewater generated by Fidelity's industrial process clearly falls within the ordinary meaning of that term, regardless of the fact that it was contaminated before Fidelity pumped it out of the ground and discharged it.

The statute also specifically provides that the term "pollutant" does not include "water derived in association with oil or gas production *and disposed of in a well, if* the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, *and if* such State determines that such injection or disposal will not result in the degradation of ground or surface water resources." 33 U.S.C. § 1362(6)(B) (emphasis added). The clear implication of this provision is that "water derived in association with oil or gas production" *is* a pollutant if it does *not* meet these criteria – that is, if it is *not* disposed of in a well approved of by the state after a determination that such disposal will not degrade ground or surface water. There can be no dispute, in this case, that the water discharged by Fidelity is "derived in

association with . . . gas production" and that it is not being disposed of in a well. Thus, as the Ninth Circuit correctly concluded, it meets the statutory definition of a "pollutant."

Moreover, as the Ninth Circuit noted, the EPA has consistently taken the position that contaminated groundwater pumped and discharged in connection with oil and gas production is a "pollutant," and that its addition to navigable waters requires a permit. Pet. App. 17a n. 5.[8] In further recognition that CBM water is a pollutant regulated by the NPDES program, EPA is developing a Best Professional Judgment (BPJ) determination to provide guidance to states, Tribes, and industry regarding treatment and disposal options for CBM produced waters. According to EPA, the process will "finalize the BPJ determination for Coalbed Methane produced waters, for use in Region 8's Clean Water Act. . . . NPDES permitting activities." 66 Fed. Reg. 46455 (Sept. 25, 2001). The **only** reason that EPA has undertaken a BPJ process is because CBM water is a pollutant subject to regulation under the NPDES program of the CWA. In this respect, too, this case is unlike *Miccosukee* where EPA's position on the merits is that no discharge permit was required for the water management district's discharges.

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[8] The Ninth Circuit showed proper deference to EPA's regulations. Such deference further aligns this case with the holding in *Gorsuch*, where the Court showed considerable deference to EPA's interpretation of what discharges are regulated as pollutants by the NPDES program. *See e.g.*, *Gorsuch*, 693 F.2d at 174, n. 56.

B. There is No Conflict on the "Pollutant" Issue.

Tellingly, Fidelity points to *no* case authority, let alone federal appellate authority, that conflicts with the Ninth Circuit's holding that contaminated groundwater pumped in connection with oil or gas production is a "pollutant." Indeed, the only other appellate decision that addresses this issue, the Fifth Circuit's decision in *Cedar Point Oil*, is fully consistent with the Ninth Circuit's decision on this point. There, the Fifth Circuit squarely held that wastewater produced in the pumping of oil or gas "is clearly subsumed by the phrases 'chemical wastes' and 'industrial wastes,'" 73 F.3d at 568, a conclusion the Fifth Circuit found to be bolstered by EPA's "produced water" regulations. *See id.*

Fidelity attempts to distinguish *Cedar Point* by erroneously asserting that its holding was premised on a finding that the produced water contained chemicals added during the drilling process. Pet. 20. However, nothing in the Fifth Circuit's opinion suggests that that fact was dispositive, and, as the court below correctly noted, the EPA regulations on which both it and the Fifth Circuit relied do not require that chemicals be added to produced water before an NPDES permit is required. Pet. App. 10a-11a. In any event, suggesting that *Cedar Point* may be distinguishable falls far short of establishing that it or any other appellate decision *conflicts* with the Ninth Circuit's holding.

Beyond *Cedar Point*, not one of the handful of other cases cited in Fidelity's petition addresses the issue

decided below at all.[9] Fidelity cites no cases holding that a permit is not required for discharges of contaminated groundwater pumped by oil and gas producers (or indeed, by any other industrial concerns), for the simple reason that there are none.[10]

The only case that Fidelity even attempts to argue is in conflict with the Ninth Circuit's ruling on the "pollutant" issue – *Gorsuch* – is, if anything, supportive of the Ninth Circuit's ruling on this point. In *Gorsuch*, the D.C. Circuit deferred to EPA's view that water that had low dissolved oxygen, low temperature, and/or was "supersaturated" with air as a result of its discharge through a dam was not a "pollutant," largely because none of these conditions was encompassed by the statutory definition of "pollutant." 693 F.2d at 171. However, the court did not question that the presence in the water of elevated levels of dissolved mineral contaminants met the definition of "pollutant," even though their presence was the result of natural processes occurring in the reservoir upstream of the dam. *See, e.g., id.* at 163, 166-67, 171-75 & n. 57. Indeed, if no "pollutant" had been present, the court would

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[9] At pages 18-20 of its petition, Fidelity argues that some of the cases relied on by the Ninth Circuit in support of its ruling that this process wastewater is a pollutant are *distinguishable*, but none of them even arguably is in *conflict* with the Ninth Circuit's holding.

[10] The two district court cases to address CBM discharges also recognized CBM wastewater as a pollutant requiring an NPDES permit. *Swarz v. Beach,* 229 F. Supp. 2d 1239, 1248 (D. Wy. 2002) (discussing the SAR and salinity of CBM process water as particularly problematic for irrigators); *Southern Colorado C.U.R.E v. Evergreen Operating Corp.*, 98-WM-1518, Magistrate's Findings at 23 (finding that coalbed methane "produced water" is a pollutant, despite fact that the oil company added nothing to the produced water).

not have had to reach the question whether the discharge of a pollutant from a dam constituted the "addition" of a pollutant to the waters downstream. *See id.* at 174-75. Thus, *Gorsuch* is fully consistent with the Ninth Circuit's holding that Fidelity's wastewater, which similarly contains elevated levels of dissolved mineral contaminants, is a "pollutant."

In short, Fidelity has cited no decision *holding* that wastewater of the type discharged by Fidelity is *not* a pollutant, and the principal decision on which it relies not only involves very different facts, but is also consistent with the Ninth Circuit's holding on the "pollutant" issue. Absent anything even approaching a conflict among the circuits over the question, Fidelity offers no reason why the issue is of such compelling importance that this Court should reconsider the Ninth Circuit's resolution of the factbound question of the application of the statutory definition of "pollutant" to the particular facts of this case.

C. There are No Other Important Reasons for Reviewing the Decision Below.

The Ninth Circuit's disposition does not break new ground under the CWA. Rather, it is a typical fact-specific determination that a particular discharge constitutes a pollutant, the type of determination that courts routinely make. *See e.g., United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (ordinary dirt is a pollutant); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (finding that liquid manure is a pollutant because definitional list includes solid waste, sewage, biological materials, and agricultural waste); *United States v. Hamel*, 551 F.2d 107, 110 (6th Cir. 1977) (gasoline

is a pollutant though not listed in the definitional list because Congress intended broad reading of term pollutant).

Much of Fidelity's argument that the Ninth Circuit's decision has far-reaching, novel implications rests upon its assertion that CBM water is "natural" and that Fidelity adds no chemicals to it before discharge. Pet. 18. Fidelity's argument contravenes the plain language of the CWA, which defines "pollutant" to include, *inter alia,* such "natural" substances as ordinary sand and rock. 33 U.S.C. § 1362(6). The proper inquiry is not whether a substance is "natural" in its original state, but whether some transformative human activity puts the substance in a place where it does not belong. As Judge Michael of the Fourth Circuit explained:

> The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. . . . It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before. *See*, 33 U.S.C. § 1362(6).

Deaton, 209 F.3d at 335-6. Thus, the Ninth Circuit was well within the mainstream of existing case law when it determined that CBM water, once removed from beneath the earth's surface by industrial activity, became a pollutant when discharged to the Tongue River and Squirrel Creek.

Nor is there any urgent policy reason for addressing the Ninth Circuit's holding on the pollutant issue. The effect of that holding is to require industrial operations such as Fidelity's to obtain permits before discharging their wastewaters into surface rivers, streams, irrigation canals, lakes, ponds, bays, estuaries, and wetlands. That requirement clearly poses no insuperable or unreasonable barriers to such operations, as demonstrated by Fidelity's own success in obtaining a permit once it applied for one.

By contrast, not requiring a permit for such activities would allow industry to pump up waters containing noxious substances and discharge them to pristine waterways without any advance approval by responsible government entities. As the record in this case demonstrates, such activities, particularly in the arid and semi-arid West, may contribute to the already significant problem of salinization of croplands as salty water is added to sources of water used for irrigation. *See* Pet. App. 4a-5a. Moreover, freeing such discharges from the requirement of advance governmental authorization would be particularly anomalous given that the CWA exempts the discharge of water produced by oil and gas extraction operations from the definition of a "pollutant" *only* when it is discharged in a disposal well approved by government authorities upon a finding that such disposal will not degrade ground or surface water quality. Allowing *unapproved* discharges of such waters to *surface streams* would turn the statutory scheme on its head by creating looser standards for such discharges than for the statutorily preferred method of returning such waters to the ground whence they came. *See, Cedar Point*, 73 F.3d at 568.

Nor is there any merit to Fidelity's contention that this case raises significant concerns about excessive

federalization of water pollution control. The CWA clearly imposes a federal requirement of an NPDES permit (issued through a federally-approved but state-operated program) when a pollutant is added to navigable waters from a point source. Whether a particular form of discharge meets that definition hardly raises grave concerns of federalism.[11]

Moreover, the suggestion that imposing this permit requirement would somehow intrude on Montana's control over its permitting program overlooks that even before the Ninth Circuit's ruling, Montana had already undertaken to issue an NPDES permit to Fidelity for some of its discharges (while denying a permit for others). In further recognition that discharges of CBM water are deleterious to irrigation water, Montana has just enacted, and EPA has approved, new water quality standards for salinity and SAR. A.R.M. § 17.30.670 (2003). Other Western states with CBM development such as Wyoming and Colorado also regulate CBM water discharges through the NPDES program. Thus the Ninth's Circuit's ruling, contrary to Fidelity's assertions, will impose no new regulatory requirements on the states or the oil and gas industry.

[11] In this respect as well, this case is quite unlike *Miccosukee*, where the issue is whether a state water management agency – not an industrial polluter – is subject to an NPDES permit requirement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 03-257

In The
Supreme Court of the United States

FIDELITY EXPLORATION & PRODUCTION COMPANY,

Petitioner,

v.

NORTHERN PLAIN RESOURCES COUNCIL INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RULES 29.6 AND 14.1 STATEMENT

WBI Holdings, Inc. owns 100 percent of the issued and outstanding common stock of Petitioner Fidelity Exploration & Production Company. Centennial Energy Holdings, Inc. owns 100 percent of the issued and outstanding common stock of WBI Holdings. MDU Resources Group, Inc. owns 100 percent of the issued and outstanding common stock of centennial. No publicly-held company owns 10 percent or more of Fidelity stock.

Respondent in this case is Northern Plains Resource Council Inc., plaintiff and appellant below.

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INTRODUCTION

Respondent Northern Plains Resource Council and amici curiae (collectively, "Respondents") purport to defend the Ninth Circuit's decision, but disavow its pivotal finding that the issue in this case is "practically indistinguishable" from the issues in *Miccosukee*. Pet. 15a. Respondents assert instead that *Miccosukee* is irrelevant and, apparently, that the Ninth Circuit did not mean what it said. That is an odd, and erroneous, contention: The court held that the *Miccosukee* line of cases "apply insofar as they reject the argument that discharge of water cannot be a pollutant simply because the discharged water is unaltered and transported from one body of water to another." Pet. 15a.

Accordingly, if *Miccosukee* is wrong, so is the Ninth Circuit's decision. The question in both cases is "practically" the same: whether the pumping and release of natural water, where nothing is added to that water, is an addition of a pollutant requiring an NPDES permit under the Clean Water Act. The Court granted certiorari in *Miccosukee* to resolve this important issue and it should likewise grant certiorari in this case.

I. AS THE NINTH CIRCUIT FOUND, THE ISSUE IN THIS CASE IS "PRACTICALLY INDISTINGUISHABLE" FROM THE ISSUES IN *MICCOSUKEE*

Respondents assert this case is different from *Miccosukee*, so the Court should ignore *Miccosukee* and its predecessors. The Ninth Circuit saw it differently. It made clear that the issue of whether Fidelity's groundwater is a pollutant "is practically indistinguishable from the issues

considered by these cases." Pet. 15a. Northern Plains tries in a footnote to wish away the Ninth Circuit's finding, suggesting the court actually found the cases distinguishable when it said they "practically" weren't. Opposition Br. ("Op.") 15 n.7.

Respondents protest that this case involves the question whether the water Fidelity releases is a "pollutant," but not whether the release of that water is the "addition" of a pollutant. As the Ninth Circuit recognized, however, the "pollutant" and "addition" issues are just flip sides of the same coin. Each depends on the other and is really just a different way of putting the other. Thus, whether the release of unaltered groundwater is the addition of a pollutant by a point source turns on whether that unaltered groundwater is a pollutant – if it is, then releasing it into another water body is the addition of a pollutant, but if it isn't, the release is not the addition of a pollutant.

This necessarily follows from the Act's plain words, which define "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Thus, the question on which the Court granted certiorari in *Miccosukee*, like the question here, is whether the release of natural, unaltered water, where nothing is added to that water, is an addition of a pollutant requiring an NPDES permit.

The circuit court conflict further reflects the truth that the "pollutant" and "addition" questions are reciprocals. Under the *Gorsuch* line of cases, a release of natural water that differs from the receiving water, but to which pollutants have not been added from the outside world, is not the addition of a pollutant. Pet. 23-24. Under the

Miccosukee line of cases, natural, unaltered water that differs from the receiving water is a pollutant, so its release into the receiving water is the addition of a pollutant. Pet. 25-27. The Ninth Circuit followed the *Miccosukee* line of cases, and thus equated the question whether the released water is a pollutant to the question whether the release of that water is the addition of a pollutant. That is why the Ninth Circuit found the issues presented in the *Miccosukee* line of cases "practically indistinguishable" from the issue presented here.

Northern Plains itself proves that the pollutant and addition questions are reciprocals. Thus, it frames the question in this case as involving "the *addition* to the waters of the United States of pollutants." Op. i (emphasis added). *See also* Op. 10 ("This case involves the addition to navigable waters of pollutants. . . ."); and 23 (a permit is required "when a pollutant is added to navigable waters from a point source").[1]

Respondents also attempt to brush aside *Miccosukee* as involving a release of natural, unaltered surface water, not natural, unaltered groundwater. This is a distinction

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[1] Notwithstanding they are reciprocals, Respondents claim Fidelity should have labeled its argument below an "addition," not a "pollutant," argument. But substance, not labels, matters. In any case, this Court has made clear that a grant of certiorari is proper where an issue not pressed by the parties is nevertheless passed upon by the court of appeals. *United States v. Williams*, 504 U.S. 36, 41-42 (1992) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law.") (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991)).

without a difference. Under *Gorsuch* and *Consumers Power*, the proper question is whether the point source physically introduces pollutants from the outside world into the natural water being released, Pet. 23-25, not what part of the earth the natural water comes from. The point source in both cases introduced no pollutants into the natural water it released. Likewise, Fidelity introduced no pollutants into the natural water it released.

The Ninth Circuit meant what it said when it stated that the issue in this case is "practically indistinguishable" from the issues in *Miccosukee*. Respondents cannot wish away *Miccosukee*, or the deep circuit court conflict that it and the Ninth Circuit's decision in this case only make deeper.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER NATURAL, UNALTERED WATER IS A POLLUTANT

Respondents assert the Court should deny certiorari because there is no case holding that natural, unaltered groundwater is not a pollutant. But Respondents admit (Op. 18) that the only other circuit court case to address this issue is *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), where the water released contained "chemicals used in the drilling process." *Id.* at 550.[2] Thus, Respondents point to no circuit

[2] Respondents claim these facts are irrelevant, but then assert the Ninth Circuit's ruling here was based on the particular facts of this case. Op. 20. *Cedar Point* specifically found the discharged water was both an "industrial" and a "chemical" waste, 73 F.3d at 568, a clear reflection of the particular facts *in that case*, where the industrial

(Continued on following page)

court case, and there is no such case, other than the Ninth Circuit's decision here, holding that natural, unaltered groundwater *is* a pollutant under the Act.

The Act's plain terms establish that natural water is not a pollutant; *Gorsuch* and *Consumers Power* hold that the release of natural surface water to which nothing is added is not the addition of a pollutant; and there is no reason to treat natural groundwater differently. After all, natural water is natural water.

Northern Cheyenne nevertheless contends the unaltered water Fidelity releases is a pollutant, asserting "Congress intended to adopt a definition of 'pollutant' that would be 'at least as broad' as that found in the Refuse Act of 1899." Br. 8 (citing *United States v. Hamel*, 551 F.2d 107, 110-11 (6th Cir. 1977)). But this claim directly conflicts with the Clean Water Act's legislative history, which, as *Gorsuch* explained, demonstrates that Congress specifically replaced the "broad term 'refuse'" with the "restrictive phrasing" of "pollutant." Pet. 11-14 (quoting *Gorsuch*). If anything, Respondents' argument only raises still another conflict for this Court's review.

Recognizing that the Act's definition means what it says when it states that "pollutant" "means" specific items listed in the statute, Respondents, like the Ninth Circuit, attempt to fit unaltered groundwater into the category of "industrial waste." Under Respondents' logic, natural water that is not waste metamorphoses into "waste" whenever it is released to navigable waters in connection

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process added chemicals from the outside world to the discharged water.

with a commercial process, even though absolutely unchanged from its natural state. But there is no metamorphosis: it is, as the petition explained, the same unaltered water before and after the process.[3] Respondents have no answer.

Respondents assert that the groundwater Fidelity releases is "produced water" and "water derived in association with oil or gas production." As Respondents concede, however, these terms do not define "pollutant," but are found within an "exception" to the definition, 33 U.S.C. § 1362(6)(B). *See, e.g.*, Northern Cheyenne Br. 10, 11, 13. But something that isn't within the Act's definition of "pollutant" in the first place doesn't become a pollutant if it doesn't fit within an exception to the definition. Pet. 21.

Respondents turn the cannon *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another") on its head, arguing that the exclusion of one thing is the inclusion of all others. Thus, Respondents assert that the exclusion in section 1362(6)(B) necessarily means that the definition of "pollutant" includes all releases that don't fit the exclusion. But the court in *Cedar Point*, which Respondents heavily rely upon, examined the same legislative history that Respondents misinterpret here and refused to read section 1362(6)(B) in this way. 73 F.3d at 568 & n.35.[4]

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[3] Northern Cheyenne concedes that the groundwater Fidelity releases has "many potential beneficial uses," Br. 9, and so undercuts the Ninth Circuit's reliance on a dictionary definition of "waste" as "any useless or worthless byproduct of a process." Pet. 10a.

[4] This is further evidence that *Cedar Point* only found produced water was a "chemical waste" and an "industrial waste" because

(Continued on following page)

Still, Respondents argue, because natural substances such as sand and rock are pollutants, so is natural, unaltered water. According to Northern Plains, a substance is automatically a pollutant if "some transformative human activity puts the substance in a place where it does not belong." Op. 21. This is an invention. First, "transformative human activity" in both *Gorsuch* (building a dam) and *Consumers Power* (generating electricity and destroying fish) put the water in its place and directed its release through a point source. Second, the proper inquiry is whether the substance is listed in the Act's definition of "pollutant." "Sand" and "rock" are, so they are pollutants. Natural, unaltered water is not, so it is not a pollutant.

Northern Plains' reliance (Op. 21) on *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), is misplaced. *Deaton* confirms that the inquiry is the one the Act sets out: whether there is "any addition of any pollutant to navigable waters from any point source." *Id.* at 335. The court observed: "The definition of pollutant ... specifically includes 'dredged spoil' that has been 'discharged into water,'" so dredged piles of dirt "were, without question, 'pollutants' within the meaning of the Act." *Id.* Discharging this dredged material "adds a pollutant that was not present before." *Id.* at 336. *See also Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (liquid manure is a "pollutant" because the Act's definitional list specifically includes "solid waste," "sewage," "biological waste," and "agricultural waste").

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chemicals were added to the water from the outside world during the industrial process. *See* 73 F.3d at 550, 568.

Finally, Respondents, like the Ninth Circuit, ignore the critical distinctions in the Act between "pollutant" and "pollution." The NPDES permit program applies only to the discharge of "pollutants," not water "pollution." Pet. 15-17. Northern Plains responds that this distinction is not "significant." Op. 8 & n.4. But it is. The Ninth Circuit relied on *Miccosukee* for the proposition that a discharge of natural water that differs from the receiving water is "pollution," and so requires a permit even though the discharged water is unaltered by man. Pet. 12a. But *Gorsuch* and *Consumers Power* hold that a permit is *not* required for the discharge of natural water to which nothing is added, though the discharged water is different from the receiving water. Pet. 23-25.

Gorsuch and *Consumers Power* are right. The Act requires a permit only for the discharge of a "pollutant," not for "pollution." In any case, this dispute only highlights the conflict between the circuit courts. Pet. 22-28.

III. THE NINTH CIRCUIT'S DECISION RAISES IMPORTANT ISSUES FOR THIS COURT'S REVIEW

Respondents assert that this case breaks no new ground. But at the same time they concede that *Cedar Point* is the only other circuit court case addressing the issue whether groundwater is a pollutant, and in that case, the water contained added chemicals from the industrial process. The Ninth Circuit's decision does break new ground – it conflicts with the *Gorsuch-Consumers Power* rationale, and it is the first to hold that *unaltered* groundwater is a pollutant.

Respondents predict a parade of horribles if Fidelity's releases were to go unregulated. But they already *are* regulated by the State of Montana, whose regulatory system ensures that water quality will be protected. Pet. 4-6, 15. That system requires a permit if the release of groundwater contains industrial waste or causes the receiving waters to exceed applicable water quality standards. *Id.*

Respondents assert there is no practical or immediate controversy, and the states and federal government are in harmony over this issue. But the Montana statute that the Ninth Circuit invalidated in this case, and the strident warnings that both *Miccosukee* and the present case set a dangerous precedent in the West (*Miccosukee*, Pet. Sup. Br. App. 5a-10a), belie this claim.

The Ninth Circuit's decision stands in support of the growing line of circuit court cases holding that "transporting water from one water body to another can violate the CWA." Pet. 14a. Like *Miccosukee*, the decision would greatly expand the NPDES program to cover virtually all releases of natural water, even though nothing is added to the released water. Echoing the Western Senators' concerns, Idaho's Governor cautioned that both decisions would work in tandem to hamper the states' authority and ability to manage water resources. *Miccosukee*, Pet. Sup. Br. App. 5a-10a. These issues, and the federalism principles that underlie them, are serious, present and in need of resolution.

The Clean Water Act means what it says. Natural, unaltered water is not a listed "pollutant" under the Act, no matter how hard Respondents try to make it one. The

Supreme Court should grant certiorari to rectify the excesses the Ninth Circuit's decision creates.

CONCLUSION

Fidelity's petition for a writ of certiorari should be granted and set for argument, or, in the alternative, granted and the case held pending the Court's decision in *Miccosukee*.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the discharge into a navigable river of highly mineralized groundwater generated from natural gas production, causing the addition of pollutants to waters of the United States, requires an NPDES permit under the Clean Water Act.

2. Whether the case herein presents any questions of law similar to those presented by *South Florida Water Management District v. Miccosukee Tribe of Indians*, No. 02-626.

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INTEREST OF *AMICI CURIAE*

Amici curiae Tongue & Yellowstone Irrigation District and the Tongue River Water Users' Association respectfully submit this brief in opposition to the Petition for Writ of Certiorari.[1] Written consent for *amici curiae* participation in this case was granted by counsel of record for the parties.

Amicus curiae Tongue & Yellowstone Irrigation District (hereinafter "T&Y") is the holder of the oldest major water right on Montana's Tongue River, into which Fidelity Exploration & Production Company discharges its coalbed methane wastewater. The Tongue River flows north from the Montana-Wyoming border until it joins the Yellowstone River, southeast Montana's largest waterbody, which eventually joins the Missouri River just inside the North Dakota border. T&Y's water right dates from 1886, when the first diversion dam was built by local businessmen who knew agriculture could not thrive without water, and Miles City could not survive without agriculture. That truism has not changed in 117 years.

Miles City is 145 windswept miles east of Montana's largest city, Billings. With a population of about 8,500, Miles City is one of Montana's larger towns. T&Y's Twelve-Mile Dam, as it is known, diverts water from the Tongue River into the T&Y Ditch twelve miles south of Miles City,

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* Tongue & Yellowstone Irrigation District and Tongue River Water Users' Association affirm that no counsel for any party in this case authored this brief in whole or in part, and that no persons or entities other than *amici* or their counsel have made a monetary contribution specifically for the preparation or submission of this brief.

then runs for 27 miles to the Yellowstone River. Along the way, it provides water to 305 irrigators who irrigate more than 9,500 acres in the lower Tongue River watershed. T&Y water irrigates a variety of crops, including alfalfa, corn, sugar beets, and small grains such as wheat, barley and oats, as well as hundreds of family gardens and fruit trees. As long as water is available for irrigation, the area served by the T&Y Ditch is relatively fertile, as it is blessed with long days of sun and relatively good soils.

Amicus curiae Tongue River Water Users' Association (hereinafter "the Association") is a nonprofit corporation comprised of ranchers and farmers. The Association was organized in 1937 to appropriate, buy, market, sell, pump, divert, develop, furnish, distribute, lease and dispose of the waters of the Tongue River and its tributaries, including the return flows and overflows of all water from the river, its tributaries, dams, canals, ditches, etc. The Association sells water to T&Y, for instance, for irrigation. The Association's members depend on the high-quality surface waters of the Tongue River, as well as its many tributaries, for their livelihoods as ranchers and farmers.

SUMMARY OF ARGUMENT

This case pits major oil and gas producers against small-town Montana farmers and ranchers. Unlike many cases in which farmers and ranchers argue against overly restrictive interpretations of the Clean Water Act, *amici* herein believe the Ninth Circuit's decision properly interprets the Clean Water Act and offers them the best hope of protecting their land and their livelihoods. The Ninth Circuit's decision in this case – which simply holds that

the wastewater generated by coalbed methane production is a "pollutant" – accomplishes the very goal Congress intended: It protects the nation's waters from the addition of pollutants that threaten to destroy not only the water upon which farmers and ranchers in southeastern Montana depend for irrigation,[2] but the very soil upon which they live and work. CBM wastewater contains many more minerals than does the water of the Tongue River. Specifically, CBM wastewater is very salty. As described in the Draft Environmental Impact Statement (DEIS) addressing CBM development in Montana, "Sodium causes osmotic stress to plants *and destroys the texture of clayey soils*; these combined effects make sodium content, and especially SAR [sodium absorption ratio], a point of emphasis when gauging impact to water resources from CBM water." Montana Statewide Draft Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (hereafter DEIS) at 4-19, 4-28, *available at* www.deq.state.mt.us/CoalBedMethane/DraftEIS/DraftPublicEIS.pdf (emphasis added). The Tongue River valley is made up of these "clayey" soils; thus, if *amici* irrigate with water that has elevated sodium and/or SAR, the land they cultivate will lose its ability to sustain plant life. In a region that receives an average of only thirteen inches of rain per year and suffers recurrent drought, the pollution of local rivers

[2] Irrigation is far and away the primary use of water in southeastern Montana, and surface water is far and away the primary source of water for irrigation. Montana Statewide Final Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans at 3-28, available at www.mt.blm.gov/mcfo/cbm/eis/volume1/Chapter3.pdf.

will spell the demise of commercial agricultural operations, family farms, and backyard gardens. This scenario – river pollution and/or the destruction of irrigated soils – will cause direct harm to every irrigator represented by *amici*.

It is worth noting that Montana is a state where water is scarce and frequently fought over. The Tongue River has run at historic lows the past three summers as a result of lingering drought; had CBM water been even marginally usable, Tongue River irrigators would have been able to irrigate more crops, which in turn would have yielded many of them more money. Irrigators rarely, if ever, refuse water someone tries to give them. They refuse CBM wastewater because it is bad for their crops, and bad for their land.

Although CBM development is in its infancy in Montana, it is projected to mature quickly and exponentially. The amount of CBM wastewater that will eventually be generated by CBM production in Montana is staggering. The FEIS addressing CBM development in Montana assumes that up to 26,475 wells will be developed in Montana – a hundredfold increase from the current 250 wells. Montana Statewide Final Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (hereafter FEIS), Alternatives at 2-25, *available at* www.mt.blm.gov/mcfo/cbm/eis/volume1/Chapter2.pdf. The vast majority of wells will be developed in a 16-county area of southeastern Montana, at the heart of which is Miles City and the Tongue River. FEIS at 1-2 (map at 1-3), *available at* www.mt.blm.gov/mcfo/cbm/eis/volume1/Chapter1.pdf. With each well producing 2.5-20 gallons per minute of wastewater, it is indisputable that full CBM production will result

in a torrent of salty wastewater in need of a place to be discharged. *Id.* at HYD-1, *available at* www.mt.blm.gov/mcfo/cbm/eis/volume2/HydrologyApp.pdf.[3]

Nonetheless, *amici* do not seek a complete ban on CBM production. They seek the protection of federal regulation through the NPDES permitting process. Specifically, they have sought – and obtained – judicial recognition that CBM wastewater is a pollutant under the CWA. Because CBM wastewater is generated as a byproduct of an industrial process and thereafter discarded, it is "industrial waste." 33 U.S.C. § 1362(6); *see also Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546 (5th Cir. 1996). Because CBM wastewater is generated as a result of natural gas production and not reinjected into deep wells, it is "produced water" not exempt from the CWA's definition of pollutant. 33 U.S.C. § 1362(6)(B). Finally, because CBM wastewater contains minerals and metals that are regulated by the EPA as "pollutants" – such as total dissolved solids, sodium, barium, boron, copper, iron, manganese, nickel and zinc – it is a pollutant. EPA's formal determination that these substances are "pollutants" is entitled to judicial deference as long as it is reasonable. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Fidelity has attempted to cast this "pollutant" case as something it is not – an "addition" case – in order to ride

[3] Fidelity, the only company currently producing CBM in Montana, is permitted to discharge up to 1600 gallons per minute (gpm) into the Tongue River from its 250 wells.

the coattails of *South Florida Water Management District v. Miccosukee Tribe of Indians*, No. 02-626. But this is not *Miccosukee*. This case involves the uncontroverted addition of highly mineralized groundwater, which is not a water of the United States, into a navigable freshwater river which *is* a water of the United States The two waterbodies are complete strangers to one another – or would be but for Fidelity's industrial natural gas production process. Thus, this case bears no similarity to any of the "addition" cases.

This is neither a 101(g) case involving states' ability to allocate water, nor a case in which sufficient deference was not afforded the EPA. It is not a case that presents any split in the circuits, nor any unique question of federal law.

For all of these reasons, *amici* irrigators respectfully urge this Court to deny Fidelity's petition.

ARGUMENT

I. The Ninth Circuit's Decision Is Consistent With Other Circuits' Interpretation of the Clean Water Act.

A. This Case is Completely Consistent with the Only Other Circuit Court Case Involving Produced Water.

The Ninth Circuit's conclusion that CBM wastewater is a "pollutant" is wholly consistent with the only other circuit court case addressing wastewater generated by oil and gas production. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546 (5th Cir. 1996); *see* Pet. App. 9a-11a. There, the defendant oil company was

extracting oil from wells in Galveston Bay, Texas, and discharging the wastewater into Galveston Bay without an NPDES permit. The Fifth Circuit held that an NPDES permit was required because the wastewater was "industrial waste," *id.* at 568; it was "chemical waste," *id.*; it was "produced water" not subject to the pollutant exemption, *id.*; and finally, it contained several substances formally recognized by EPA as pollutants. *Id.* at 568-69.

The Ninth Circuit applied similar reasoning herein, and concluded that CBM wastewater was a pollutant because it was industrial waste, it was produced water not exempted by the statute, and it caused "pollution" of the receiving water. Pet. App. 9a-13a. While Fidelity may disagree with the Ninth Circuit's reasoning – or at least with its conclusion – the fact is that the only two Circuit Courts of Appeals to address the issue of "produced water" applied similar reasoning and achieved similar results. This Court's review is therefore unnecessary.

B. The Ninth Circuit's Decision Is Consistent with Both Lines of "Addition" Cases.

After determining that CBM wastewater was a pollutant, the Ninth Circuit addressed Fidelity's contention that "unaltered water" cannot be a pollutant. Pet. App. 13a-15a. It is in this context that the Ninth Circuit made the comment trumpeted by Fidelity as evidence that *Miccosukee* was key to this case. The Court of Appeals cited *Miccosukee*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492-93 (2d Cir. 2001), and *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1299 (1st Cir. 1996), for the proposition that "transporting water from one water body to another can

violate the CWA." Pet. App. 14a. In each of these cases, water contaminated with one or more pollutants was removed from one water body and added to another water body, which did not have the same level of pollutants. In each case, the Circuit Courts of Appeal held that pollutants were "added" to the receiving water. Although the case herein did not involve any issue of "addition," it is consistent with this line of cases.

But more importantly, it is equally consistent with the second line of cases, known as the "dam cases." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). These cases hold that water moving through a dam is not "added" to the water below the dam. In *Gorsuch*, which involved water-quality changes induced by a dam, the D.C. Circuit held that no NPDES permit was required based upon judicial deference to EPA, which argued that pollutants must be introduced from "the outside world." *Gorsuch*, 693 F.2d at 165. EPA was given similar deference by the Sixth Circuit in *Consumers Power*, which involved moving water from Lake Michigan through a turbine and back into the lake. The turbine killed many fish; thus, the return flows to Lake Michigan were filled with dead fish. The Sixth Circuit held that the *transformation* of water by a point source is not an "addition" under the CWA, and is therefore not subject to NPDES permitting. *Consumers Power*, 862 F.2d at 585-86. As in *Gorsuch*, EPA argued that unless a pollutant is introduced from "the outside world," there is no "addition." *Id.* at 584-85.

In neither of the "dam cases" was the issue of "pollutant" addressed. The *Gorsuch* court observed that thermal changes are included in the CWA's definition of

"pollutant," but deferred to the EPA for fact-specific determinations on a case-by-case basis. 693 F.2d at 173-74 (quoting CWA sponsor Senator Muskie as saying, "Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another."). The *Consumers Power* court similarly acknowledged that dead fish would be pollutants as "biological materials." 862 F.2d at 585. Nonetheless, the pivotal determination in both cases was that no pollutant had been added to waters of the United States from "the outside world" because nothing was added to the water; it was the same water, simply "transformed." Lacking any "addition" of a pollutant, both courts held the CWA did not apply.

Thus, the issue raised by these cases is what constitutes the "outside world." Whether this Court resolves the tension between these two lines of cases by defining the "outside world" historically (i.e., have the waterbodies ever been one), hydrologically (i.e., are they hydrologically connected), or legally (i.e., whether both waterbodies are waters of the United States), the case herein will be unaffected. CBM wastewater has no connection whatsoever to the surface waters into which it is being discharged. The groundwater being pumped from deep coalbed seams is wholly distinct from the surface water into which it is being discharged. Moreover, the groundwater is not a navigable water, while the Tongue River is. The "pollutant" – CBM wastewater – first enters the waters of the United States when it is discharged from the point source by Fidelity. Thus, there is no question that CBM wastewater is being added to the Tongue River and its tributaries from "the outside world," however that phrase is interpreted by this Court.

II. The Ninth Circuit's Decision Is Correct, And Does Not Merit Review.

The Ninth Circuit's decision not only presents no conflict with any other circuit, it is consistent with common rules of statutory interpretation as well as with the EPA's own determination in this case.

The Ninth Circuit held that CBM wastewater is a pollutant because it is "industrial waste," which it found encompassed "any useless byproduct derived from the commercial production and sale of goods and services." Pet. App. 10a. This holding is consistent with the Fifth Circuit's holding in *Cedar Point Oil*, which specifically noted that the wastewater from Cedar Point's oil production process was a pollutant both as "industrial waste" and as "chemical waste." 73 F.3d at 568. As industrial waste is explicitly listed as a pollutant in the Clean Water Act, no discharges of it may occur without a permit.

Not surprisingly, Fidelity contests this holding as an "expansive reading" of the term "industrial waste." Pet. 18. But statutory interpretation based upon the plain language of a statute is hardly novel jurisprudence. The Ninth Circuit's interpretation – which does not conflict with any other circuit court or with the EPA's determination in this case – merely applies plain-language definitions to the phrase "industrial waste." As noted by the Fifth Circuit, water is "the highest volume waste source in offshore oil and gas operations." *Id.* at 551. The same is certainly true for CBM operations. Thus, it seems wholly logical to describe a substance that is generated as the result of an industrial process and subsequently discarded as "industrial waste" – regardless of whether that substance is "natural water." The "natural" state of the water

is irrelevant for purposes of the CWA. If the receiving water has no historical, hydrological, or legal connection to the source water, then the source water is an "addition" to the receiving water. If the remaining four elements under the CWA are met, an NPDES permit is required before discharge.

A second basis for the Ninth Circuit's holding was that CBM wastewater is "produced water" that is not reinjected into state-approved wells, and therefore not exempt from the CWA. Pet. 10a. After listing several categories of pollutants, the Clean Water Act states that pollutant does *not* mean:

> (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(6)(B). In other words, Congress chose to exempt from NPDES permitting the disposal of water "derived in association with oil or gas production" if it is disposed of in a well and meets other criteria. While CBM water is indisputably "derived in association with oil or gas production," Fidelity is not reinjecting any of it.[4]

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[4] It should be noted that Fidelity could reinject CBM water into state-approved wells, and would not be required to get an NPDES permit to do so. Moreover, *amici* would prefer this method of disposal.

The Fifth Circuit was compelled by this statutory exemption to note that the exclusion of produced water in certain circumstances was "a strong indicator of Congress's concern over the effects of produced water on the environment." 73 F.3d at 568. Moreover, noted the Fifth Circuit, "If, absent an exemption, produced water reinjected into a state-approved well is a pollutant, then it is hardly a stretch to say that produced water deposited directly into a bay is also a pollutant." *Id.* The Ninth Circuit found this logic compelling. Pet. 11a ("The CWA only exempts water derived from gas extraction from regulation when the water is disposed of in a well and will not result in the degradation of other water bodies.").

Fidelity argued to the Ninth Circuit, as it did in its petition, that "produced water" must have chemicals added to it. Pet. 20, 10a. Once again applying commonly accepted rules of administrative law, however, the Ninth Circuit looked to EPA's definition of "produced water," which clearly does not require the addition of chemicals:

> *Produced water* means the water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas, and *can* include formation water, injection water, and any chemicals added downhole or during the oil/water separation process.

40 C.F.R. § 435.41(bb), 40 C.F.R. § 435.11(bb) (emphasis added); *see also* 40 C.F.R. § 63.761, 40 C.F.R. § 68.3 (Clean Air Act) ("*Produced water* means water that is extracted from the earth from an oil or natural gas production well, or that is separated from crude oil, condensate, or natural gas after extraction."). In other words, water that is pumped from underground coal seams during the extraction of natural gas is produced water, regardless of

whether chemicals have been added to it. Moreover, the EPA's reference to produced water as brine implicitly recognizes that water from "the hydrocarbon-bearing strata" is salty – and for irrigators who depend upon fresh water, salt is anathema.

Simply put, the Ninth Circuit's opinion broke no new legal ground. It is consistent with other circuits' approach to statutory interpretation under the Clean Water Act. Most importantly, the holding – that CBM wastewater is a "pollutant" under the CWA – in no way rests upon this Court's ultimate holding in *Miccosukee*. Regardless of how this Court defines "the outside world" for purposes of the Clean Water Act, the decision of the lower court will be unaffected. Whether this Court adopts the *Miccosukee-Dubois* line of reasoning or the *Gorsuch-Consumers Power* line, coalbed seams are unquestionably "the outside world" to the Tongue River.

CONCLUSION

For the foregoing reasons, *amici* Irrigators respectfully request that the petition be denied.

DATED: September 18, 2003.

Respectfully submitted,

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No. 03-257

IN THE
Supreme Court of the United States

FIDELITY EXPLORATION AND PRODUCTION COMPANY,

Petitioner,

v.

NORTHERN PLAINS RESOURCE COUNCIL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NORTHERN CHEYENNE TRIBE IN SUPPORT OF RESPONDENT

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INTERESTS OF THE *AMICUS CURIAE*

This brief is filed by *amicus curiae* Northern Cheyenne Tribe (the "Tribe") in opposition to the Petition for Certiorari filed by Fidelity Exploration and Production Company ("Fidelity"). The Tribe participated as *amicus curiae* below, and files this brief pursuant to Supreme Court Rule 37.2(a)[1]. The Tribe has a direct interest in the case because Fidelity and other natural gas producers operating upstream of the Northern Cheyenne Reservation discharge waste water associated with coal bed methane production into the Tongue River, the mid-channel of which forms the eastern boundary of the Reservation.[2] *Id.* The Tribe holds reserved water rights to the Tongue River which were recognized in a Tribal-State compact ratified by Congress on September 30, 1992. Pub. L. 102-374, 106 Stat. 1186. Tribal members, as well as many off-Reservation farmers and ranchers, depend on the Tongue River to irrigate their farms and pastures.

This case concerns whether natural gas producers may discharge salty waste water generated in association with the production of natural gas from coal beds (coal bed methane or "CBM") into the Tongue River of southeastern Montana without a National Pollutant Discharge Elimination System ("NPDES") permit issued by the State of Montana under the federal Clean Water Act. The answer to this question does not turn on the outcome of *South Florida Water Management District v.*

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1. The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amicus* curiae. No person or entity, other than the named *amicus* and their counsel, made any monetary contribution to the preparation and submission of this brief.

2. The Northern Cheyenne Tribe has approximately 8,000 members and occupies a Reservation comprising approximately 445,000 acres of land in southeastern Montana. About 90 percent of the Reservation's population is Northern Cheyenne and all but one percent of the land is held in trust by the United States for the Tribe and its members.

Miccosukee Tribe of Indians, No. 02-626, a case the Court will hear in its October 2003 term. Rather, it turns on whether CBM waste water falls under the plain language of the Clean Water Act's definition of the term "pollutant." 33 U.S.C. § 1362(6). The Ninth Circuit held that Fidelity's discharge falls under the Act's definition because (1) it is an "industrial waste," and (2) it is "produced water" *i.e.* "water derived in association with the production of . . . gas" which the Act treats as a "pollutant" unless it is disposed of in a State-approved well in the manner specified by 33 U.S.C. § 1362(6)(B). App 9a-11a. These narrow rulings affect only one component of the natural gas industry, are consistent with the language and legislative history of the Clean Water Act, follow the holdings of other circuits addressing the disposal of produced water, and accord with current agency and industry practice. Notwithstanding the grant of certiorari in *Miccosukee*, the Court should deny Fidelity's petition here.

STATUTORY PROVISIONS INVOLVED

The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Under the Act, the "discharge of any pollutant" from a "point source" into the waters of the United States is unlawful, unless the discharge is made in accordance with an NPDES permit issued by either the United States Environmental Protection Agency ("EPA") or a state or tribal agency authorized by EPA to administer the NPDES permit program. 33 U.S.C. §§ 1311(a), 1342. NPDES permits must contain conditions that ensure that discharges fall within technology-based effluent limitations, which in turn must be sufficiently stringent to provide for compliance with state or tribal water quality standards.[3] 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1)(A).

3. The EPA is authorized to treat Indian tribes as States for various purposes of the Act, including the promulgation of water quality standards and the issuance of NPDES permits. 33 U.S.C. § 1377(e). The Tribe has applied for treatment as a state for the purpose of implementing the Act's water quality standards program.

The sole issue in this case is whether CBM waste water discharged into the Tongue River is a "pollutant" as that term is defined in the Act, 33 U.S.C. § 1362(6). App. 7a. Fidelity's Petition for Certiorari fails to include the Act's entire definition of "pollutant," omitting a crucial clause which pertains to "water derived in association with oil or gas production." 33 U.S.C. § 1362(6)(B). The full definition of "pollutant," including the omitted language reads:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and *industrial*, municipal, and agricultural *waste discharged into water*. This term does *not mean* (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title, or (B) water, gas, or other material which is injected into a well to facilitate production of oil and gas, or *water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in degradation of ground or surface water resources.*

33 U.S.C. § 1362(6) (emphasis added). The Ninth Circuit held that Fidelity's waste water falls within this definition because it is "industrial . . . waste discharged into water" and because it is "water derived in association with . . . gas production" that is not disposed of in accordance with the subsection B exception (*i.e.* via State-approved injection wells).

STATEMENT OF THE CASE

A. The Threat to Water Quality Posed by the Coal Bed Methane Industry.

Fidelity extracts natural gas from coal seams underlying the Tongue River valley of southeastern Montana from a well field upstream of the Northern Cheyenne Reservation. To produce CBM in this region, the coal seam aquifer must be partially dewatered, a process that produces 13,000 to 17,000 gallons of waste water daily per well. App. 3a.

The waste water produced by Fidelity's natural gas wells is "salty." It is about three times more saline that the ambient waters of the Tongue River and has a Sodium Absorption Ratio (SAR), a measure of the ratio of sodium to calcium and magnesium in the water, which is 40 to 60 times higher than river water. App. 4a. Use of high SAR water for irrigation causes long-term damage to soils, especially the clayey soils which predominate in the Tongue River valley. *Id.*

Currently there are about 250 producing CBM wells in Montana. However, the coal beds underlying the Tongue River valley have been targeted by Fidelity and other natural gas producers for larger-scale production. A Final Environmental Impact Statement recently released by the United States Bureau of Land Management and the State of Montana forecasts up to 14,000 producing CBM wells in Montana portion of the Tongue River watershed over the next 20 years. Montana Statewide Final Oil and Gas Environmental Impact Statement (January 2003) ("FEIS") at 4-5, *available at* www.mt.blm.gov/mcfo/cbm/eis. Tens of thousands of additional wells are projected in the upstream Wyoming portion of the watershed. *Id.* at 4-9. The FEIS warns that with this level of development, unregulated discharge of produced water could lead to "severe" degradation of water quality that would "limit the uses of affected waters" on the Northern Cheyenne Reservation. *Id.* at 4-72.

B. Proceedings Below.

This case began when the Northern Plains Resource Council (NPRC) brought a citizen enforcement action against Fidelity under the Clean Water Act alleging that Fidelity was discharging waste water from its CBM wells without an NPDES permit. In the district court, the parties stipulated that Fidelity was engaged in a discharge of waste water from a point source to a navigable water without a permit. The only issue before the court was whether Fidelity's waste water is a "pollutant." In an oral ruling granting Fidelity's motion for summary judgment, the district court held that Fidelity's waste water is not a pollutant requiring an NPDES permit. App. 7a. The district court never issued a written opinion.

NPRC appealed to the Ninth Circuit Court of Appeals. The Tribe as well as several irrigation districts and associations supported NPRC's appeal as *amici curiae*. App. 7a n.3. On April 10, 2003, the Ninth Circuit issued an opinion reversing the district court. App. 1a-18a. The Ninth Circuit held that the "plain language" of the Clean Water Act requires the conclusion that CBM waste water is a "pollutant" subject to regulation under the Act. App. 9a.

First, the Court held that Fidelity's waste water is "industrial waste," a term specifically included in the Act's definition of "pollutant." App. 9a. The Court reasoned that "[b]ecause Fidelity is engaged in production of methane gas for commercial sale and because CBM water is an unwanted byproduct of the extraction process, CBM water falls squarely with the ordinary meaning of 'industrial waste.'" *Id.* at 10a.

Second, the Court held that CBM waste water is a "pollutant" because it is "'produced water' derived from gas extraction." App. 10a (citing *Sierra Club v. Cedar Point Oil*, 73 F.3d 546, 568 (5th Cir.), *cert. denied*, 519 U.S. 811 (1996)). The Court reasoned that CBM waste water falls into the EPA's definition of the term "produced water" and that the Act

"only exempts water derived from gas extraction from regulation when the water is disposed of in a well and will not result in the degradation of other water bodies." *Id.* at 11a (citing 33 U.S.C. § 1362(6)(B)). Because Fidelity discharges its waste water "directly into the Tongue, not by reinjection into a state-approved well," its waste water "does not meet § 1362(6) exemption criteria," and is "a pollutant within the plain meaning of the [Clean Water Act]." *Id.*

The Court explained that its conclusion is supported by the Act's definition of "pollution" which is the "man-made or man induced alteration of the chemical, physical, biological and radiological integrity of water." App 11a (citing 33 U.S.C. § 1362(19)). The Court reasoned that by discharging CBM water into the Tongue River, Fidelity "alters the water quality of the Tongue River." *Id.* A holding that "the massive pumping of salty, industrial waste water into protected waters does not involve the discharge of a 'pollutant,'" the Court found, would "undermine the integrity of [the CWA's] prohibitions." *Id.* at 12a.

REASONS FOR DENYING THE PETITION

1. The plain language of the Clean Water Act supports the Ninth Circuit's decision that CBM waste water falls under the Act's definition of "pollutant." Fidelity's discharge is not only an "industrial waste," it also is "produced water," *i.e.* "water derived in association with the production of . . . gas." 33 U.S.C. § 1362(6). Fidelity discharges its waste water directly into the Tongue River, not via injection into a State-approved well in accordance with the "produced water" exemption provided for in 33 U.S.C. § 1362(6)(B). There is no circuit split on the issue of whether "water derived in association with . . . gas production" is a "pollutant" under the Clean Water Act when it is discharged directly into the surface waters of the United States. To the contrary, the only other circuit court decision to address this issue, *Sierra Club v. Cedar Point Oil*, 73 F.3d 546 (5th Cir.), reached the same conclusion as the Ninth Circuit here, and this Court denied certiorari. 519 U.S. 811 (1996).

2. This case is distinguishable from *Miccosukee* and similar cases addressing whether dams and other surface water management activities "add" pollutants to navigable waters. In the case at bar, the waste water at issue originates from deep below the surface of the earth (outside the "waters of the United States") and is the byproduct of an industrial process – the production of natural gas from coal seams. Even if this Court reverses the Eleventh Circuit's ruling in *Miccosukee*, it would not affect the Ninth Circuit's ruling that Fidelity's CBM discharge falls within the plain language of the Clean Water Act's definition of "pollutant" because it is both "industrial waste" and "produced water."

3. The EPA has long required NPDES permits for the disposal of CBM waste water on lands within its jurisdiction, as have major CBM producing states such as Colorado and Wyoming. Fidelity has already obtained NPDES permits from the State of Montana for all of the discharges at issue in this case. The lack of any practical or immediate controversy over the application of the NPDES permit requirement to the discharge of CBM waste water counsels against a grant of certiorari which would upset the *status quo* and create regulatory uncertainty at a time when CBM production is burgeoning throughout the Rocky Mountain west.

I. WATER DISCHARGED AS A RESULT OF NATURAL GAS PRODUCTION IS A "POLLUTANT" UNDER THE PLAIN LANGUAGE OF THE CLEAN WATER ACT.

A. Fidelity's Discharge is "Industrial Waste."

The first basis for the Ninth Circuit's ruling that Fidelity's discharge is a "pollutant" under the Clean Water Act was that it fits within the broad category "industrial waste." App. 9a. Applying the ordinary meanings of the terms "industrial" and "waste," the Court of Appeals concluded that an industrial waste is "any useless byproduct derived from the commercial production of goods and services." App. 10a. Because Fidelity

is engaged in the commercial production of natural gas and because its waste water is an "unwanted byproduct of the extraction process," Fidelity's waste water "falls squarely within the ordinary meaning of 'industrial waste.'" *Id.*

The Ninth Circuit's ruling not only accords with the plain meaning of "industrial waste," it also accords with the legislative history of the Act's definition of the term "pollutant." This history demonstrates that Congress intended to adopt a definition of "pollutant" that would be "at least as broad" as that found in the Refuse Act of 1899, 33 U.S.C. § 407, which prohibits the discharge of "any refuse matter of any kind or description whatever" into any navigable water. *See United States v. Hamel*, 551 F.2d 107, 110-11 (6th Cir 1977), citing S. Rep. No. 92-414 at 76, *reprinted in*, *A Legislative History of the Water Pollution Control Act Amendments of 1972* 2:1494 (Envtl. Pol. Div., Cong. Research Serv. 1973) (hereafter "1972 Leg. Hist."); *see also*, 2 W.H. Rodgers, *Environmental Law: Air and Water*, § 4.9, at 144 (Congress "meant to carry on the tradition of the Refuse Act and that tradition was to construe the word 'refuse' as condemning each and every variation of damage-inducing wastes that changing technologies could invent."). Thus, while the definition of "pollutant" includes some very specific items such as "cellar dirt," it also broadly lists "industrial, municipal and agricultural wastes," thereby sanctioning "the inclusion of discharged substances that are not specifically listed into these broad categories." *Cedar Point Oil*, 73 F.3d at 565; *see also National Wildlife Fed'n v. Gorsuch*, 693 F.3d 156, 174 n.56 (D.C. Cir. 1982); *Hamel*, 551 F.2d at 110-111.

Fidelity claims that its discharge does not constitute a "pollutant" because it does not physically introduce pollutants from the "outside world" into the waters of the United States. Petition for Certiorari at 22-23 (citing *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584, 586 (6th Cir. 1988) and *Gorsuch*, 693 F.2d at 174-75). The force of Fidelity's

argument, however, depends on how one defines the "outside world." From the perspective of the Clean Water Act, the "outside world" is any place outside "navigable waters" or the "waters of the United States." *See* 33 U.S.C. § 1362(12) ("discharge of a pollutant" means the "addition of any pollutant to *navigable waters* from *any* point source" [emphasis added]); *id.* § 1362(7) ("navigable waters" means the "waters of the United States"). The "waters of the United States" do not include ground waters. *See* 40 C.F.R. § 122.2; *Village of Oconomowoc v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir.), *cert. denied*, 513 U.S. 930 (1994). Because Fidelity extracts "salty" groundwater from deep below the earth, water that would otherwise "never reach the Tongue River were it not for Fidelity's extraction process," App. 3a, and discharges it as a waste product to the river, it *does* add pollutants from the "outside world" to the "waters of the United States."

Fidelity also argues that the Ninth Circuit's analysis was faulty because CBM waste water "can be and is used for" various beneficial purposes including domestic use, stock watering and wildlife. Petition for Certiorari at 18 n.7. But the mere fact that CBM waste water has many *potential* beneficial uses cannot alter the fact that Fidelity discharges water to the Tongue River as an unwanted by-product which, if unregulated, will degrade the natural and economic value of the river's waters. No doubt, beneficial uses can be found for many of the other substances listed in the Act's definition of "pollutant." *See* 33 U.S.C. § 1362(6) (listing "rock" and "sand" as pollutants). But under the Clean Water Act, like the earlier Refuse Act, such substances, no matter how useful in certain applications, become "pollutants" once they are discharged as unwanted by-products into the Nation's waterways. *See United States v. Standard Oil Co.*, 384 U.S. 224, 226 (1966) (rejecting contention that the phrase "refuse matter" in the Refuse Act excluded valuable substances and holding gasoline to be a "pollutant" under that statute); 2 Rodgers, *supra*, § 4.9, at 144 (under Clean Water Act a "pollutant" can be viewed as a "resource out of place").

In essence, Fidelity argues that "unaltered groundwater" can *never* be an "industrial waste" or a "pollutant" under the Clean Water Act. *See* Petition for Certiorari at 18. But as the Ninth Circuit reasoned, such a *per se* rule would "upset the integrity" of the Act. App. 14a. The fact that groundwater is "natural" or "unaltered" does not necessarily mean that it is benign.[4] Indeed, the record shows that CBM waste water is "salty" and contains high levels of SAR which can render surface waters unusable for irrigation. App. 4a. There is no "compelling reason" why this Court should grant a writ of certiorari to review the Ninth Circuit's fact-bound ruling that the unwanted, "salty" water that is discharged into the Tongue River as a result of Fidelity's CBM extraction process is an "industrial waste" and therefore a "pollutant" under the Clean Water Act.

B. Water Derived in Association with the Production of Natural Gas is a "Pollutant" under the Clean Water Act.

The Act's broad definition of "pollutant," which encompasses all "industrial, municipal and agricultural waste discharged into water," is subject to a narrowly drawn exception for "water derived in association with oil or gas production" when the water is "disposed of in a well" which has been

4. Many industries discharge "unaltered groundwater" that may be hazardous to public health and the environment. For example, mining operations often result in discharges of "natural" but nevertheless toxic groundwater. *See, e.g., Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473-75 (9th Cir. 2000) (groundwater filling mine pit and discharged to adjacent surface waters could exceed State water quality standards); *Montana Envt'l Info. Center v. Montana Dep't of Envtl. Quality*, 296 Mont. 207, 988 P.2d 1236, 1239 (1999) (mining company's discharge of groundwater containing naturally high levels of arsenic). Similarly, naturally occurring groundwater extracted for geothermal energy development can pose environmental hazards. *See, e.g., State Water Resources Department v. City of Klamath Falls*, 68 Or. App. 148, 682 P.2d 779, 784 & n.5 (1984) (State pollution discharge permit required for disposal of geothermal fluids derived from wells).

approved by a state based on a determination that underground disposal will not degrade ground or surface waters. 33 U.S.C. § 1362(6)(B). The Ninth Circuit held that Fidelity's discharge is a "pollutant" because it is "produced water," *i.e.* "water derived in association with . . . gas production," that is *not* disposed of in accordance with the terms of this exemption. App. 10a-11a.

The Ninth Circuit's holding is consistent with the Congressional intent. Congress's use of the broad term "industrial waste" in defining pollutant coupled with its crafting of a very narrow, conditional exception for "water derived in association with oil or gas production" is an indication that it intended that such produced water would be treated as a "pollutant" if it is not disposed of in accordance with the conditions specified in 33 U.S.C. § 1362(6)(B). *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent"); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). Congress would not have created this very narrow, conditional exception, if it intended that all water produced as a byproduct of gas production would be exempt from the Act.

In *Cedar Point Oil*, 73 F.3d at 567-69, the Fifth Circuit held that waste water derived in association with oil and gas production was a "pollutant" when discharged into the waters of Galveston Bay. The court reasoned that the Act's conditional exception for "water derived in association with oil or gas production" from the meaning of "pollutant" was a "strong indicator of Congress's concern over the effects of produced water on the environment." *Id.* at 568. The court further reasoned:

> [I]f Congress felt that it was necessary to draft a detailed exemption for produced water that has been disposed of in a state-approved reinjection well, it may be that Congress believed that such produced water would otherwise be a pollutant. If, absent an

> exemption, produced water reinjected into a state-approved well *is* a pollutant, then it is hardly a stretch to say that produced water deposited directly into a bay is also a pollutant.

Id. (emphasis in original). The Court emphasized that because Congress provided a "clear avenue" for oil or gas producers to avoid regulation by the Clean Water Act, a producer that "chose not to avail itself" of that avenue should be subject to the Act. *Id.* at 568 n.36.

Fidelity attempts to distinguish *Cedar Point Oil* on the basis that the "produced water" at issue in that case apparently included materials added to water in the oil and gas production process.[5] Petition for Certiorari at 18-19. However, as the Ninth Circuit's opinion points out, EPA defines "produced water" to mean "water (brine) brought up from the hyrdocarbon-bearing strata during the extraction of oil and gas," a definition which "does not turn on the addition of chemicals or any other alteration." App. 10a (quoting 40 C.F.R. 435.41(bb)).[6] Furthermore, the Act's definition of "pollutant" does not use the term "produced water," but instead uses the more inclusive term "water derived in association with oil or gas production." 33 U.S.C. § 1362(6)(B). In this case, there can be no dispute that the waste water discharged by Fidelity into the Tongue River is "derived in association with . . . gas production ," and is *not*

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5. In some cases, produced water contains residual quantities of crude oil, a "natural" constituent of groundwater found in association with crude oil deposits. *See BP Exploration & Oil v. United States Envtl. Protection Agency*, 66 F.3d 784, 792 (6th Cir. 1995). Fidelity position would mean that "unaltered groundwater" containing naturally occurring crude oil residues could not be treated as a pollutant when brought to the surface in an oil well.

6. Fidelity points out that this definition of "produced water" applies only to offshore and coastal oil and gas operations. Petition for Certiorari at 20 n.9. Nevertheless, the regulations applicable to *onshore* oil and gas operations specifically list "produced water" as a "waste water pollutant." 40 C.F.R. § 435.32.

"disposed of in a well" approved by the State of Montana. Petition for Certiorari at 2-3. Accordingly, the Ninth Circuit logically concluded that Fidelity's waste water is a "pollutant" under the plain language of the Clean Water Act, 33 U.S.C. § 1362(6)(B).

The legislative history of the Clean Water Act strongly supports the Ninth Circuit's conclusion. The Senate Committee Report for the legislation that became the Clean Water Act indicates that the Senate intended to create only "two *specific* exceptions from the term pollutant: sewage from vessels, as that term is defined and controlled through the provisions of Section 312, and water, gas, or other materials associated with the secondary recovery of oil." S. Rep. No. 92-414 at 76 (1971), *reprinted in*, 1972 Leg. Hist. 2: 1494 (emphasis added). The Senate intended to exempt "water derived in association with oil or gas production" only if the water was "disposed in a well . . . approved by authority of the State in which the well is located." 1972 Leg. Hist. 2:1698.

The House version of the bill further tightened the Senate's already narrow exemption by requiring not only that the water be disposed of in a State-approved well but also that the State make a determination that the well disposal "will not result in the degradation of ground or surface water resources." *Compare* 1972 Leg. Hist. 1:1068, *with id.* 2:1697-98. The House Committee Report emphasized that this exception was to be construed very narrowly:

> It is the intent of Congress that the exclusion from the term "pollutant" relating to the injection of *water*, gas, or other materials into wells applies only . . . to the *properly executed disposal in wells* of brines derived in association with the production of crude oil or natural gas, *with appropriate precautions taken to assure that such injection or disposal does not lead to, or make substantially more likely, the degradation of usable water resources*. For such

> exclusion to be effective, the State is required (1) to approve the well used either to facilitate production or for disposal purposes, and (2) *to make a determination, based on sufficient investigation and evidence, that such degradation has not taken place and has not been or will not be made substantially more likely as a result of such injection or disposal.*

H.R. Rep. No. 92-911 at 131 (1972), *reprinted in*, 1972 Leg. Hist. 1:818 (emphasis added).

The debate on the floor of the House confirms that Congress would not have intended that produced water be exempt from the NPDES requirement except under the specific conditions spelled out in the definition of "pollutant." It also shows that Congress was concerned about the deleterious effects of the produced water itself, not only the materials that may be added to the water in the oil and gas production process. 1972 Leg. Hist. 1:595. On the House floor, Representative Aspin proposed an amendment to strike the exception altogether. *Id.* at 1:589. However, the supporters of the exception led by Representative Harsha successfully argued that water produced in association with oil and gas extraction should not be regulated under the Clean Water Act as long as it was disposed of in a well regulated under existing state schemes applicable to the oil and gas industry. Representative Harsha explained that "*[h]uge volumes of water* are commonly found in the same underground strata as oil and gas and come up with produced oil and gas." *Id.* at 1:595 (emphasis added). He noted the "injection of *brine water* resulting from petroleum operations back into the earth for disposal purposes is itself an important form of pollution control" and argued that it was not appropriate that this form of control would be "displaced by new Federal authority." *Id.* at 1:596 (emphasis added). Representative Harsha also explained that the House Committee had previously considered Representative Aspin's proposal but had instead added an amendment providing additional safeguards that were not present in the Senate bill. He pointed out:

> [The House bill] is much more stringent than S. 2770 – its Senate-passed counterpart on this issue. [It] . . . tightens this provision [in S. 2770] down considerably and will not permit this process until the State makes a finding or determination that such process will not degrade the waters.

Id. 1:595.

The Conference Committee largely retained the House language. According to Senator Muskie, the bill's sponsor:

> The language of the House amendment as regards pollutants associated with oil and gas production was clarified to indicate that the process of injection and disposal of materials associated with oil and gas production from wells would be excluded *only* where a State regulatory program existed. The Conferees intend that this provision assure that no injection or disposal occur in such a manner as to present a potential hazard to ground water quality.

1972 Leg. Hist. 1:178 (emphasis added). Thus, the legislative history shows that the exemption for "water derived in association with oil or gas production" was enacted on the premise that it was unnecessary to treat water produced by oil or gas wells as a pollutant under the Clean Water Act *only* in cases where the water is disposed of in a State-approved well pursuant to an adequate State program to protect ground and surface waters. The debate on this issue confirms that Congress clearly did *not* contemplate that "water derived in association with . . . gas production" would be exempt from the Act's definition of "pollutant" when discharged directly to surface waters where it could harm crops, soils, fish and wildlife.

In short, the Ninth Circuit's holding is consistent with the plain language of the Act, the Act's legislative history and the decision of the Fifth Circuit in *Cedar Point Oil*. Fidelity has identified no circuit split on this issue and no other basis that would warrant the issuance of a writ of certiorari.

II. THIS CASE DOES NOT TURN ON THE OUTCOME IN *MICCOSUKEE*.

In an effort to convince the Court to at least provisionally grant certiorari pending the outcome in *Miccosukee*, Fidelity argues that this case turns upon the issue before the Court in *Miccosukee*: *viz.* whether dams and other types of surface water management activities should be subject to the NPDES requirement of the Clean Water Act. *See* Petition for Certiorari at 29. In *Miccosukee Tribe of Indians v. South Florida Water Management Dist.*, 280 F.3d 1364, 1367-69 (11th Cir. 2002), the Eleventh Circuit held that a public agency that manages a flood control project consisting of a system of levees, canals and water impoundment areas must obtain an NPDES permit when it pumps polluted water from one water impoundment area to another because such pumping constitutes the "addition" of a pollutant "from" a point source. The First and Second Circuits have likewise held that an NPDES permit is required for activities that involve interbasin transfers of surface water. *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.2d 481, 492 (2d Cir. 2002) (diversion of water from a reservoir containing pollutants through a tunnel into a creek constituted "addition" of pollutants from a point source); *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996) (pumping of polluted surface water for use in snowmaking and its subsequent discharge into a lake would constitute an "addition" of pollutants from a point source), *cert. denied*, 521 U.S. 1119 (1997). On the other hand, the D.C. Circuit and the Sixth Circuit have held that dams and other surface water management facilities do not require an NPDES permit where they do not "add" pollutants from the "outside world," *i.e.* from outside the "waters of the United States," into navigable waters.[7]

7. The above cases have differences as well as similarities. For example, *Consumers Power* and *Gorsuch* involved exchanges of water from the same water body, while *Catskill Mountains* and *Dubois* involved interbasin transfers. *Dubois* unlike the other three cases involved a discharge resulting from a private commercial activity (snowmaking) rather than more traditional "surface water management."

Consumers Power Co., 862 F.2d at 589; *Gorsuch*, 693 F.2d at 175.

The case *sub judice* is distinguishable from the above cases on at least three important grounds. First, it does not involve a transfer between two bodies of navigable waters. Second, it does not involve "surface water management," but instead involves an industrial process that produces copious amounts of groundwater as a waste product – water that would otherwise remain deep below the earth and never enter the "waters of the United States." Finally, the waste water at issue here is "produced water," *i.e.* "water derived in association with . . . gas production," a waste product which is expressly mentioned in the Act's definition of "pollutant" and which is afforded a unique status under that definition. 33 U.S.C. § 1362(6)(B). These three differences are entirely dispositive of the issues in this case. Thus, regardless of how the Court may in *Miccosukee* resolve the perceived circuit conflict over whether dams and other surface water management activities "add" pollutants to navigable waters, the Court's decision would not detract from the Ninth Circuit's holding that groundwater produced in the CBM extraction process is a "pollutant" under the Clean Water Act.[8]

It is true that the Ninth Circuit cited *Miccosukee*, *Catskill Mountains* and *Dubois* for the proposition that "transporting water from one water body to another [without an NPDES

8. Fidelity's petition repeatedly seizes on the Ninth Circuit's statement that the issue of whether CBM water is a pollutant is "practicably indistinguishable" from the issues considered in *Miccosukee* and other similar cases. App. 15a. But as the Ninth Circuit itself recognized elsewhere in its opinion, the determination of whether Fidelity's waste water is a "pollutant" ultimately turns on the plain language of Act's definition of "pollutant," rather than on case law construing the meaning of the term "addition." Ironically, Fidelity argued below that this case was distinguishable from *Miccosukee* for precisely this reason. *Id.* It is only now that the Court granted certiorari in *Miccosukee* that Fidelity has changed its position to embrace the alleged similarities between the two cases.

permit] *can* violate the [Clean Water Act]." App 14a-15a (emphasis added). But this statement merely responded to Fidelity's extreme position that a discharge of "unaltered water" would *never* require an NPDES permit under *any* circumstances, a proposition that finds *no* support in the case law. *Id.* at 15a (rejecting argument that "discharge of water *cannot* be a pollutant simply because the discharged water is unaltered"). As shown above, the Ninth Circuit was right to reject that argument and hold that a discharge of "unaltered water" without a permit *does* violate the Clean Water Act at least where the water is a waste product of an industrial process, originates from deep below the "waters of the United States," is "derived in association with oil or gas production," and is not injected in a State-approved well. 33 U.S.C. § 1362(6)(B).

Because these important statutory rules were not implicated in the line of cases addressing dams and other surface water management activities, the Court's decision in *Miccosukee* will not address the issue presented by this case. Accordingly, there is no reason for the Court to grant certiorari pending its decision in *Miccosukee* as Fidelity requests. *See* Petition for Certiorari at 29. On the contrary, because there is no authority supporting Fidelity's position on the narrow issue of whether waste water discharged in the CBM extraction process is a "pollutant" under the Clean Water Act, Fidelity's petition should be denied in its entirety.

III. PRACTICAL CONSIDERATIONS DO NOT SUPPORT ISSUANCE OF A WRIT OF CERTIORARI.

There is no practical necessity for the Court to grant certiorari to decide whether the waste water generated as a result of CBM production should be treated as a "pollutant" under the Clean Water Act. There is remarkable unanimity among federal and state agencies that waste water derived from the production of CBM is a "pollutant" under the Clean Water Act and that its discharge requires an NPDES permit. The EPA requires CBM producers to obtain NPDES permits on Indian reservations, the

only places where it exercises direct Clean Water Act jurisdiction.[9] Likewise, environmental agencies in major CBM producing States such as Colorado and Wyoming currently require NPDES permits for discharges of CBM produced water.[10] Fidelity has itself obtained NPDES permits for all of the discharges at issue in this case. App. 7a n.2. Fidelity does not attempt to make any showing that the NPDES permit requirement has imposed any unreasonable burden on natural gas producers in Montana or in other states. Indeed, Fidelity is currently seeking to expand its Montana operation notwithstanding the NPDES permit requirement.

Fidelity maintains that certiorari should be granted because the Ninth Circuit's decision raises federalism concerns. But it is important to note that the effects of CBM discharges are not confined to the boundaries of individual states. For example, CBM discharges in Wyoming already affect water quality in the downstream Montana reaches of the Tongue River. Fidelity's discharges in Montana similarly affect water quality on the nearby Northern Cheyenne Reservation. The NPDES permit requirement ensures that the water quality standards of neighboring states and tribes are respected when another state decides to allow discharges of CBM water into the "waters of the United States." The Tribe believes that disposal of the massive quantities of waste water produced by this rapidly expanding new industry should conform to the requirements of

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9. *See* 66 Fed. Reg. 46,455 (Sept. 5, 2001) (announcing development of "Best Professional Judgment" determination of effluent limitations for NPDES permitting of CBM wells on Indian lands); 55 Fed. Reg. 40,235, 40,236 (Oct. 2, 1990) (issuing general NPDES permit for CBM wells on Colorado's Southern Ute Reservation).

10. *See* http://deq.state.wy.us/wqd/watershed/91131.pdf (Wyoming general NPDES permit for CBM production); *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1270-72 (D. Wyo. 2002); *Southern Colorado C.U.R.E. v. Evergreen Operating Corp.*, No. 98-WM-1518 (D. Colo. 1999) Recommendation of Magistrate Judge at 23-24; Colorado NPDES Permit Issued to J.M. Huber Corp. (Appellee's Excerpts of Record at 178-80).

the federal Clean Water Act and should not be left solely to the policy choices of individual states.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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